APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED MARCH 7, 2007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 05-1296

NSK LTD., NSK CORPORATION, and NSK BEARINGS EUROPE, LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN-BCA CORPORATION,

Plaintiffs-Appellants,

and

ASAHI SEIKO CO., Ltd.,

Plaintiff,

and

ISUZU MOTORS LTD. and MPB CORPORATION,

Plaintiffs,

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v.

UNITED STATES,

Defendant-Appellee,

and

TIMKEN U.S. CORPORATION,

Defendant-Appellee.

March 7, 2007, Decided

OPINION

Before BRYSON, GAJARSA, and LINN, *Circuit Judges.*

BRYSON, *Circuit Judge.*

This appeal from a decision by the United States Court of International Trade concerns the twelfth administrative review of an antidumping duty order covering antifriction bearings from Japan. *NSK Ltd. v. United States*, 346 F.Supp.2d 1312 (CIT 2004). The four appellants, which we refer to collectively as NTN, appeal from the portion of the trial court's judgment sustaining the Department of Commerce's use of "facts otherwise available" and "adverse inferences" when determining NTN's antidumping duty margin.

I

On June 19, 2001, Commerce published a notice of initiation of the twelfth administrative review of an antidumping duty order covering certain antifriction bearings imported from Japan. *Notice of Initiation of*

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Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part, 66 Fed. Reg. 32,934 (June 19, 2001). NTN was included in that review.

During the review proceeding, Commerce issued an antidumping duty questionnaire and a supplemental questionnaire to NTN. Among other things, the questionnaires inquired into NTN's method of calculating and reporting freight expenses for bearings sold in its home market and in the United States. Commerce requires respondents to report freight expenses incurred on products covered by the antidumping duty order because it must adjust normal values and U.S. prices for freight costs before comparing them. 19 U.S.C. §§ 1677a(c)(2)(A), 1677b(a)(6)(B)(ii). Commerce prefers to receive freight expense data in terms of the cost per transaction but has acknowledged that it is not always possible for companies to report freight costs in that form. *See* 19 C.F.R. § 351.401(g). Accordingly, Commerce permits respondents to calculate certain expenses by allocating the total expense incurred to individual product sales, as long as the allocation method is done on "as specific a basis as is feasible" and is shown not to cause inaccuracies or distortions. *Id.* For example, allocated reporting may be required when multiple items are included in a single shipment but only some of the items are subject to the antidumping duty order. In that case, the total freight cost can be apportioned among the shipped products on the basis of factors such as the weight of the products.

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Commerce's questionnaires specifically requested information about freight expenses. Commerce stated that if NTN found it necessary to allocate its freight expenses, it should allocate them according to the basis on which the expenses were incurred, such as weight or volume. If NTN incurred freight expenses on multiple bases (e.g., weight and distance), it was directed to allocate them according to at least one of the bases on which they were incurred. If, however, NTN was unable to allocate its freight expenses according to the bases on which they were incurred, Commerce required NTN to (1) explain how it allocated the expenses, (2) explain why it could not allocate them on the bases on which they were incurred, and (3) demonstrate that the allocation method that NTN selected in its response was not distortive. Commerce directed that in selecting the allocation method NTN should use the least distortive allocation methodology available. Additionally, Commerce requested that NTN report the weight of each product that was subject to the antidumping duty order.

NTN responded to the inquiry by noting that its freight expenses were incurred on multiple bases and that there was no one basis common to all those expenses. NTN asserted that the only variable on which it had data for all its products was sales value. It therefore allocated its freight expenses according to that variable. It offered the following statement to demonstrate that the "sales value" method of allocation was not distortive: "This allocation methodology is not distortive because it represents the most consistent method of estimating

what the freight expenses would have been." When Commerce inquired further into the freight expense issue in its supplemental questionnaire, NTN asserted that allocation according to sales value "is not distortive because it bases freight expense on the factor common to each shipment, sales value. Because [sales value] is common to all shipments, the freight expense cannot be shifted in favor of one shipment or another." NTN further argued that sales value is as non-distortive as weight because larger bearings are more expensive than smaller ones.

In response to the question about the weight of its products, NTN responded that it "does not use weight in its calculation of freight expenses," and it therefore asserted that Commerce had no need to elicit information about the weight of each product. When asked a second time about the weights of its products, NTN again stated that it could not allocate freight expenses on the basis of weight and then asserted that it did not track and thus did not have available the weights of some of its products. It did not include either a complete or a partial list of the requested data.

Commerce rejected NTN's allocation methodology and determined the freight expenses by "drawing adverse inferences" from "facts otherwise available," pursuant to 19 U.S.C. § 1677e. The Court of International Trade affirmed that determination. *NSK*, 346 F.Supp.2d at 1342-43. The court reasoned that Commerce permissibly rejected NTN's proffered allocation method because NTN had failed to demonstrate that it had

allocated freight expenses on as specific a basis as was feasible, had failed to demonstrate that its allocation method was non-distortive, and had failed to provide the requested weight data from which Commerce might have been able to estimate freight expenses. Because NTN did not have usable freight expense data in the record, the court held that it was appropriate, pursuant to 19 U.S.C. § 1677e(a), for Commerce to use "facts otherwise available" to calculate the freight expenses. Furthermore, the court held that because NTN had failed, despite two requests, to provide usable freight expense data or a sufficient explanation as to why its method was not inaccurate or distortive, Commerce was justified in concluding that NTN had not acted to the "best of its ability" to comply with Commerce's review. Accordingly, the court held that it was appropriate, pursuant to 19 U.S.C. § 1677e(b), for Commerce to apply "adverse inferences" to the facts otherwise available when determining freight expenses. 346 F.Supp.2d at 1342. Because Commerce's determinations are supported by substantial evidence and are not erroneous as a matter of law, we affirm.

II

We review antidumping determinations made by Commerce according to the same standard of review that is used by the Court of International Trade. We will uphold Commerce's determinations unless they are unsupported by "substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed.Cir.2000).

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A

NTN argues that Commerce was wrong to reject NTN's proffered freight expense data. According to NTN, Commerce had the information it needed and was not justified in using facts otherwise available to determine NTN's freight expenses. As noted, to justify allocating expenses on a basis not used in incurring them, a respondent must demonstrate that the proposed method does not cause inaccuracies or distortions and that it has allocated its expenses on as specific a basis as is feasible. 19 C.F.R. § 351.401(g). Here, NTN failed both requirements.

First, NTN failed to demonstrate that allocation by sales value is not distortive or inaccurate. Instead of setting forth a full explanation of why sales value is non-distortive, NTN relied on a brief conclusory assertion to that effect. NTN's explanation consisted of little more than a combination of the obvious observation that sales value is a feature of every product and the unsupported assertion that sales value is "the most consistent method of estimating what the freight expenses would have been." That explanation says nothing about the relationship between sales value and freight expense and thus provides no reason to conclude that allocation by value is accurate and non-distortive. The statement that allocation by value prevents freight costs from being shifted in favor of one shipment or another similarly does not disclose anything about the relationship between sales value and shipping costs, and it thus also fails to demonstrate that the "sales value" method is accurate

and non-distortive. Even assuming that NTN's statement is true, the most it proves is that NTN cannot intentionally manipulate the result of the allocation method. It does not show that the result is accurate and non-distortive absent such manipulation.

Second, NTN argues that allocation by sales value is as specific as is feasible and that allocation by weight — Commerce's preferred allocation method — is at least as distortive as allocation by sales value because larger bearings are more costly than smaller bearings. NTN failed, however, to provide record evidence in support of that assertion. Accordingly, in addition to failing to demonstrate that value-based allocation is accurate and non-distortive, NTN failed to show that its allocation method was the most specific feasible method. Commerce was therefore justified in rejecting NTN's submission as insufficient. *See* 19 C.F.R. § 351.401(g). Because NTN also did not provide the requested weight data, the Court of International Trade properly sustained Commerce's decision that it did not have the information necessary to conduct its review and so was justified in using facts otherwise available.[1] *See* 19 U.S.C.

1. NTN makes the related argument that before using facts otherwise available to calculate its freight expenses, Commerce was required to comply with 19 U.S.C. § 1677m(d), which provides that if Commerce determines that a response to a request for information is insufficient, it must notify the submitter and provide an opportunity to remedy or explain the deficiency. Commerce, however, satisfied its obligations under section 1677m(d) when it issued a supplemental questionnaire specifically pointing out and requesting clarification of NTN's deficient responses.

(Cont'd)

§ 1677e(a) (facts otherwise available can be used when, for example, "necessary information is not available on the record").

B

NTN next argues that even if Commerce was justified in using facts otherwise available to determine freight expenses, it was not justified in drawing adverse inferences when doing so. Under 19 U.S.C. § 1677e(b), when making a determination from facts otherwise available, Commerce may sometimes select which facts to use by applying an inference adverse to the respondent. This can be done if the respondent has "failed to cooperate by not acting to the best of its ability

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(Cont'd)

NTN further argues that even if its remedial response was unsatisfactory, section 1677m(e) required Commerce to use the freight expense data NTN provided. Section 1677m(e) provides that Commerce must use a submitter's information as long as the submitter demonstrates that it acted to the best of its ability in complying with the request for information, and as long as the information is timely, capable of verification, sufficient to serve as a reliable basis for the determination, and usable without undue difficulties. NTN's argument under section 1677m(e) stands or falls with NTN's last argument, that Commerce was wrong to use an adverse inference under section 1677e(b) when choosing among the facts otherwise available. Both arguments require NTN to have cooperated with Commerce to the "best of its ability." 19 U.S.C. §§ 1677e(b), 1677m(e)(4). Because we hold that NTN failed to satisfy the "best ability" requirement of section 1677e(b), it also failed to satisfy the "best ability" requirement of section 1677m(e).

to comply with a request for information." 19 U.S.C. § 1677e(b). Acting to the best of one's ability under that statute "requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir.2003). Whether a respondent has lived up to that requirement is assessed by determining "whether [the] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Id.* While that standard does not require perfection, it "does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.*

In finding that an adverse inference was justified in this case, Commerce noted that NTN failed to explain adequately how its allocation method is non-distortive. That finding is supported by substantial evidence. It was reasonable for Commerce to conclude that NTN's summary statements, unrelated to the relationship between its freight expenses and the basis on which those expenses were allocated, did not reflect a legitimate attempt to provide Commerce with a "full and complete" demonstration of the accuracy or non-distortive effect of the allocation methodology. NTN argues that "Commerce neglected to explain or analyze whether NTN willfully decided not to comply with its request, or alternatively, whether NTN's conduct fell below the standard for a reasonable respondent." However, we have specifically rejected the argument that Commerce is required to make such findings, stating that "section 1677e(b) does not by its terms set a 'willfulness' or 'reasonable respondent' standard, nor does it require

findings of motivation or intent." *Nippon Steel*, 337 F.3d at 1383. NTN also argues that Commerce did not clearly articulate a reason for its application of an adverse inference. Commerce, however, separately addressed why it found that NTN had not acted to the best of its ability. It stated, among other things, that NTN failed to change its allocation method or expand on why allocation by sales value was not distortive, even after a second request from Commerce. We agree with the trial court that Commerce's explanation was sufficient under the applicable statutory standard and that Commerce permissibly applied an adverse inference to the facts otherwise available when calculating NTN's freight expenses.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DATED AUGUST 20, 2004

UNITED STATES COURT OF INTERNATIONAL TRADE

Consol. Court No.: 02-00627

NSK LTD. and NSK CORPORATION, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

TIMKEN U.S. CORP.,

Defendant-Intervenors.

August 20, 2004, Dated

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OPINION

Wallach, Judge:

I

INTRODUCTION

In this action, Plaintiffs NSK Ltd., NSK Corp., (collectively "NSK Japan"); NSK Bearings Europe, NSK Corp., (collectively, "NSK Europe"); NTN Corp., NTN

Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft, NTN-BCA Corp., (collectively, "NTN"); MPB Corp. ("MPB"); Asahi Seiko Co. ("Asahi"); and Isuzu Motors, Ltd. ("Isuzu") challenge the final results of an administrative review issued by the United States Department of Commerce ("Commerce") with respect to *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Administrative Reviews*, 67 Fed.Reg. 55,780 (Aug. 30, 2002) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2002). For the following reasons, Commerce's determination is affirmed in part and remanded in part.

II

BACKGROUND

On May 15, 1989, the Department published in the Federal Register the antidumping duty orders on ball bearings ("BBs") and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom and on spherical plain bearings and parts thereof from France. *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand*, 54 Fed.Reg. 20,909 (May 15, 1989) ("Original Investigation"). On June 19, 2001, Commerce published a notice of initiation of the twelfth administrative review of these orders, covering a period of review ("POR") of May 1, 2000, through April 30, 2001, for the subject

Japanese BBs. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 66 Fed.Reg. 32,934 (June 19, 2001) ("Initiation of Twelfth Administrative Review").

Commerce published the preliminary results in this administrative review in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and The United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews*, 67 Fed.Reg. 17,361 (April 10, 2002) ("Preliminary Results"). Commerce issued the Final Results on August 30, 2002. The scope of this order covers ball bearings, mounted or unmounted, and parts thereof, including all antifriction bearings that employ balls as the rolling element. Final Results, 67 Fed.Reg. at 55,780. Products that fall under these parameters include antifriction balls, BBs with integral shafts, BBs (including radial BBs) and parts, and housed or mounted BB units and parts.[2] *Id.* In the Final Results, Commerce

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2. These products are classified under the following subheadings in the Harmonized Tariff Schedule of the United States (HTSUS):

3926.90.45,	4016.93.00,
4016.93.10,	4016.93.50,
6909.19.5010,	8431.20.00,
8431.39.0010,	8482.10.10,
8482.10.50,	8482.80.00,
8482.91.00,	8482.99.05,

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found a 6.07% weighted-average margin for NSK Japan, 16.87% for NSK Europe, 9.72% for NTN, 2.51% for Asahi, and 73.55% for Isuzu. *See id.* at 55,781.

III

PARTIES' ARGUMENTS

Asahi, NSK Europe, and NSK Japan challenge Commerce's decision to assign a zero margin to sales above normal value when calculating the weighted average dumping margin. Commerce and Timken argue that Commerce's methodology is supported by substantial evidence and is in accordance with law.

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8482.99.2580, 8482.99.35,
8482.99.6595, 8483.20.40,
8483.20.80, 8483.50.8040,
8483.50.90, 8483.90.20,
8483.90.30, 8483.90.70,
8708.50.50, 8708.60.50,
8708.60.80, 8708.70.6060,
8708.70.8050, 8708.93.30,
8708.93.5000, 8708.93.6000,
8708.93.75, 8708.99.06,
8708.99.31, 8708.99.4960,
8708.99.50, 8708.99.5800,
8708.99.8080, 8803.10.00,
8803.20.00, 8803.30.00,
8803.90.30, and 8803.90.90.

Final Results, 67 Fed.Reg. at 55,780.

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Asahi claims that, because service was made to it after the regulatory deadline by Torrington, Commerce improperly initiated its administrative review. Commerce and Torrington posit that Commerce conducted the administrative review of Asahi in accordance with law.

Asahi disputes Commerce's use of model-specific methodology to conduct its below-cost test. Commerce and Torrington argue that its methodology is supported by substantial evidence and is in accordance with law.

Commerce and Timken argue that Isuzu did not exhaust its administrative remedies and thus is now precluded from relying upon certain proprietary information to support its corroboration argument. Isuzu claims, on the contrary, that the Government waived the exhaustion argument by consenting to its access to information protected under the Judicial Protective Order in this case.

Isuzu challenges Commerce's adverse facts available determination, applying the highest calculated rate and corroborating it with contemporaneous sales, after Isuzu did not cooperate in this review. Commerce and Timken argue that Commerce's choice of adverse facts available rate is supported by substantial evidence and is in accordance with law.

MPB claims that Commerce's determination to accept NTN's reported cost data is erroneous. NTN argues that it reported its cost data accurately and Commerce agrees that NTN responded adequately to the questionnaires.

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NSK Europe states that Commerce improperly interpreted "foreign like product" for calculating constructed value. Commerce and Timken say that the Federal Circuit has affirmed Commerce's interpretation.

NTN argues that Commerce incorrectly applied adverse facts available in calculating its home-market and U.S. freight expenses. Commerce, MPB, and Timken state that Commerce's methodology is supported by substantial evidence and is in accordance with law.

NTN challenges Commerce's treatment of inputs that NTN obtained from affiliated suppliers in calculating cost of production and constructed value. Commerce, Torrington, and Timken argue that Commerce's determination is supported by substantial evidence and is in accordance with law.[3]

NTN points out that there were clerical errors in the amended final results computer program that affected the accuracy of NTN's dumping margin. Commerce agrees and requests a remand to exclude export price sales from NTN's U.S. freight and warehouse expense calculations.

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3. During the July 7, 2004, oral argument, counsel for NTN stated that pursuant to *NTN Corp. v. United States*, 306 F.Supp.2d 1319 (CIT 2004), NTN was "abandoning" its claim challenging Commerce's determination to use the highest transfer price, cost of production, or market value to value the major inputs NTN purchased from its affiliated supplier. Accordingly, the issue is moot.

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IV

STANDARD OF REVIEW

This court will uphold an administrative antidumping determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B) (2002); *SKF USA v. INA Walzlager Schaeffler KG,* 180 F.3d 1370, 1374 (Fed.Cir.1999). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion." *Aimcor, Alabama Silicon, Inc. v. United States,* 154 F.3d 1375, 1378 (Fed.Cir.1998) (quoting *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed.Cir.1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). It is not the court's duty to "weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas v. United States,* 966 F.2d 660, 665 (Fed.Cir.1992).

In examining an agency's interpretation of a statute, this court is confronted with two questions. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, the

court must consider if "Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. If Congress has not spoken directly on the issue, this court cannot simply impose its own construction of the statute, but instead looks at whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. "[I]t is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981). A court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978).

Appendix B

V

ANALYSIS

A

Commerce's Decision to Assign a Zero Margin to Sales Above Normal Value in Calculating the Dumping Margin Is Supported by Substantial Evidence and Is In accordance with Law

1

Commerce's Decision to Assign a Zero Margin is In Accordance with U.S. Statute

Asahi, NSK Japan, and NSK Europe challenge Commerce's assignment of a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV"). While conceding that this court has upheld Commerce's methodology previously, NSK Japan and NSK Europe argue that the "methodology so biases antidumping calculations that the presence of a single U.S. sale below normal value can produce a dumping margin, even though there exists hundreds of sales for which the opposite is true." NSK Ltd. & NSK Corp. Motion for Judgment on the Agency Record ("NSK Japan's Motion") at 6; NSK Bearings Europe Ltd. & NSK Corp's Motion for Judgment on the Agency Record ("NSK Europe's Motion") at 7. NSK Japan and NSK Europe claim that the definition of

dumping in 19 U.S.C. § 1677(35)(A)[4] "reaffirms that dumping only exists when normal value exceeds export price or constructed export price *of the subject merchandise,*" thus reiterating that the "focal point of any antidumping inquiry is the class of merchandise." NSK Japan's Motion at 7 (emphasis in original); NSK Europe's Motion at 8-9 (emphasis in original). NSK Japan argues that Commerce calculated a 6.07% dumping margin on BBs while over 85% of its U.S. sales exceeded NV and that the overall margin for BBs class of merchandise was (-18.78%). NSK Japan's Motion at 11. NSK Europe similarly argues that Commerce calculated a 16.87% margin on BBs though over one-half of its sales exceeded NV and the overall margin for BBs was (-7.93%). NSK Europe's Motion at 12-13.

Commerce argues that U.S. antidumping law directs the agency to assign a zero value to sales where the U.S. price, the EP or CEP, exceeds NV. Defendant's Response in Partial Opposition to the Motions for Judgment upon the Agency Record Filed by Asahi Seiko, Isuzu, MPB, NSK Europe, NSK Japan, and NTN ("Defendant's Response") at 12. Commerce states that

> [t]his effectively excludes "all non-dumped sales or sales with 'negative' margins." *Pam, S.p.A. v. United States*, 265 F.Supp.2d 1362, 1369-70 (CIT 2003). "At the same time,

4. The statute, 19 U.S.C. § 1677(35)(A), states: "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."

> Commerce includes the value of dumped sales in the dumping margin, which are therefore referred to as sales with a 'positive' margin." *Id.* The percentage of the weighted average dumping margins determined for a specific exported or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). In the *Final Results,* Commerce applied this methodology and assigned a zero value for Asahi, NSK Europe, and NSK Japan. *Decision Memo* at Comment 3, P.App. at Tab 2.

Id. at 11. To support its arguments, Commerce first asserts that the plain language of the statute requires it to focus on sales prices "below" fair value. For, 19 U.S.C. § 1677(35)(A) defines dumping as the "amount by which the [NV] *exceeds* the [EP] or [CEP] of the subject merchandise." *Id.* at 12 (emphasis in original). Second, "weighted average dumping margin" is defined as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). This, Commerce argues, leads to the conclusion that the statute directs Commerce to aggregate entries when the NV exceeds the U.S. price in determining the "weighted-average dumping margin." Commerce claims that this methodology does not ignore the non-dumped sales because

> [t]his does not mean, however, that we ignore sales that were not priced below normal value in calculating the weighted-average rate. It is important to recognize that the weighted-average margin will reflect any "non-dumped" merchandise examined during an investigation or review because the value of such sales is included in the denominator of the weighted-average dumping margin calculation while no dumping amount for "non-dumped" merchandise is included in the numerator. Thus, a greater amount of "non-dumped" merchandise results in a lower weighted-average margin.

Issues and Decision Memorandum for the Administrative Reviews of Ball Bearings (other than tapered roller bearings) and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom-May 1, 2000, through April 30, 2001, A-100-001, from Richard W. Moreland, Deputy Assistant Secretary for Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration (August 3, 2002) ("Issues and Decision Memorandum") at 13; Defendant's Response at 14. Moreover, Commerce cites that its methodology is reasonable and that a number of cases from this court have upheld its weighted-average dumping methodology. It argues that if it were to offset the dumping margins with sales greater than NV, there would be a canceling out of margins which would in turn permit the selective use of dumping. Defendant's Response at 16.

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The Defendant-Intervenor Timken supports Commerce's use of zeroing methodology. It claims that U.S. law requires zeroing, as "dumping margin" is defined as the amount by which NV *"exceeds"* EP or CEP and a "weighted dumping margin is the sum of 'dumping' margins," ' not the sum of dumping margins and the amounts by which export or constructed export prices exceed normal value." Response of Timken U.S. Corporation, Defendant-Intervenor, to the Rule 56.2 Motions of Asahi Seiko Co., Ltd., et al. ("Timken's Response") at 22. Timken argues that the history of antidumping duty administration, since the Antidumping Duty Act of 1921, shows that U.S. authority has computed dumping margins on an entry-by-entry basis and has even responded in the negative for requests of including negative margins in its regulations. *Id.* at 23 (citing U.S. Administration of the Antidumping Act of 1921, Report by the Comptroller General to the Congress of the United States at 33, ID-79-15 (Mar. 15, 1979) and *Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies,* 52 Fed.Reg. 30,660, 30,662 (Aug. 17, 1987) concerning 19 C.F.R. § 353.24(b)(1989)). Timken further argues that neither the legislative history of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994), nor the URAA, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-826, at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, set out changes to Commerce's zeroing methodology. *See* Timken's Response at 27. Timken states that in the URAA the "crafters of the law intended to implement the requirements for fair comparison as they understood

them: by defining what prices were to be used and how they were to be adjusted to determine normal value." *Id.* at 28. Thus, Timken finds Commerce's interpretation of 19 U.S.C. § 1675(a)(2)(A) to be reasonable.

Commerce's zeroing methodology has been upheld by this court and the Federal Circuit as reasonable on many previous occasions. *See Timken Co. v. United States*, 354 F.3d 1334, 1340-45 (Fed.Cir.2004); *Pam, S.p.A. v. United States*, 265 F.Supp.2d 1362, 1370 (CIT 2003); *Corus Staal BV v. United States* 259 F.Supp.2d 1253, 1260-65 (CIT 2003); *Timken Co. v. United States*, 240 F.Supp.2d 1228 (CIT 2002); *Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 926 F.Supp. 1138, 20 CIT 558, 570 (1996); *Serampore Indus. Pvt. Ltd. v. United States*, 675 F.Supp. 1354, 11 CIT 866, 873-74 (1987). Because, however, the "statute is silent on the question of zeroing negative dumping margins," *see Bowe Passat*, 926 F.Supp. 1138, 20 CIT at 572, *see also Timken*, 354 F.3d at 1341-42, in determining whether Commerce's interpretation is in accordance with the law, this court applies the *Chevron* standard. *See also Corus Staal BV*, 259 F.Supp.2d at 1261. This inquiry examines whether Commerce's interpretation of the statute is reasonable and sustains the interpretations if the answer is in the affirmative. *See Pam, S.p.A.*, 265 F.Supp.2d at 1371; *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed.Cir.1996).

Commerce and Timken justify the use of zeroing, pointing out that 19 U.S.C. 1677(35)(A) defines a dumping margin as the amount by which NV *"exceeds"*

EP or CEP; and, the dictionary definition of "exceeds" is "[t]o be greater than; surpass." The American Heritage Dictionary of the English Language 638 (3d ed.1996). Addressing this issue, the Federal Circuit in *Timken*, 354 F.3d at 1342, stated that

> while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction. Basically, one number "exceeds" another if it is "greater than" the other, meaning it falls to the right of it on the number line. Here, because Commerce's zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

Furthermore, "weighted average dumping margin," as defined in 19 U.S.C. § 1677(35)(B), requires Commerce to take the aggregate dumping margin and divide it by the aggregate export prices, which include all prices of *all* sales. *Pam, S.p.A.*, 265 F.Supp.2d at 1371. In considering the policy backdrop to the statute, Commerce also convincingly points out that offsetting dumping margins with sales greater than NV would allow foreign companies to practice selective dumping. *See Timken*, 354 F.3d at 1342-43. Thus, zeroing prevents foreign producers from "masking [their] dumping with more profitable sales." *Serampore Indus.*, 675 F.Supp. 1354, 11 CIT at 874; *see Timken*, 354 F.3d at 1343. Accordingly, Commerce's interpretation of the U.S.

statute, using dumped sales in the aggregate and dividing these by all sales, including nondumped sales, is a reasonable interpretation of the statute. *See Pam, S.p.A.*, 265 F.Supp.2d at 1371.

2

Commerce's Decision to Assign a Zero Margin is In Accordance with U.S. WTO Obligations

Asahi, NSK Japan, and NSK Europe claim that, in employing zeroing methodology, Commerce has interpreted and applied the U.S. statute in a WTO-inconsistent manner. Asahi argues that Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") "require[s] a fair comparison of margins, and zeroing violates this precept." Motion of Asahi Seiko Co. Ltd. for Judgment on the Agency Record Pursuant to Rule 56.2 ("Asahi's Motion") at 9. Asahi, NSK Japan and NSK Europe argue that the WTO Panel Report in *European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R (Mar. 1, 2001) (*"EC-Bed Linen"*), which deemed the EC's zeroing methodology to be WTO-inconsistent, supports its argument that Commerce's zeroing methodology is WTO inconsistent.[5] NSK Japan

5. NSK Japan says that "NSK Japan rests its case on U.S. antidumping law. Our discussion of the WTO Panel decisions serves only to demonstrate that international legal authorities concur that NSK Japan is right and Commerce is wrong." NSK

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and NSK Europe also point out that the WTO Panel's decision in *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001), in which it determined that the arm's length test failed to give equal weight to affiliated transactions that occurred above and below prices of unaffiliated transactions, underscores the idea that the "antidumping law's 'fair comparison' requirements are not met when there is an identifiable bias in the methodology employed." NSK Japan's Motion at 9; NSK Europe's Motion at 11.

Commerce argues that the WTO AD Agreement and the Appellate Body decision in *EC-Bed Linen* "have no effect upon this proceeding, which is governed by United States statutory law." Defendant's Response at 18-19. Furthermore, Commerce challenges Plaintiffs' ability to bring this WTO consistency claim for want of standing. It claims that allowing Plaintiffs to bring such a claim frustrates the explicit intent of Congress in U.S. statute and the SAA. If Plaintiffs have standing to bring a WTO claim, Commerce argues that Article 2.4.2 of the AD Agreement do not apply because the WTO Agreement is not self-executing. Commerce also posits that *EC-Bed Linen*, as a WTO Appellate Body decision, has no binding effect on the U.S. as per the SAA. As a result, Commerce

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Japan's Motion at 7 n. 19. NSK Europe similarly states "NSK Europe rests its case on U.S. antidumping law. Our discussion of the WTO Panel decisions serves only to demonstrate that international legal authorities concur that NSK Japan is right and Commerce is wrong." NSK Europe's Motion at 9 n. 22.

asserts, its zeroing methodology does not violate U.S. obligations under international law. Defendant's Response at 22.

Timken argues that the U.S. is under no obligation to follow WTO panel and Appellate Body reports, as they are only binding on the WTO Member countries who are parties; even then, the particular member has a variety of options in terms of what actions it can take in response to a WTO ruling and U.S. law does not integrate automatically WTO rulings. *See* Timken's Response at 31-34. In particular, Timken argues that *EC-Bed Linen* does not apply to the case at hand because it deals with the computation of dumping margins during an antidumping investigation and not an administrative review. Similarly, Article 2.4.2 applies only to investigations and not reviews. Thus, Timken sees no conflict between Commerce's zeroing methodology, the WTO AD Agreement, and *EC-Bed Linen.* Timken's Response at 37.

Commerce's zeroing methodology is not WTO-inconsistent.[6] *See Timken,* 354 F.3d at 1344. This court

6. Commerce claims that pursuant to 19 U.S.C. § 3512(c)(1) that Plaintiffs have no standing to challenge its interpretations of U.S. statute vis-a-vis the WTO Agreements and Reports, because the statute states that "no person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any agency . . . on the ground that such action or inaction is inconsistent with [the URAA]." As in *Timken v. US,* 240 F.Supp.2d at 1238, the Plaintiffs

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considers the relationship between a U.S. statute and U.S. international obligations, because, pursuant to the *Charming Betsy*[7] doctrine, "it has . . . been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." 6 U.S. at 188, 2 Cranch 187. The WTO AD Agreement does not explicitly prohibit the practice of zeroing, nor does it use the term "zeroing." *Pam, S.p.A.*, 265 F.Supp.2d at 1373; *Corus Staal*, 259 F.Supp.2d at 1263. Specifically, AD Agreement Article 2.4.2. states that dumping margins should be based on a "comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. . . ." While the Plaintiffs argue that Commerce disregards the nondumped transactions through zeroing, as explained in *Bowe Passat*, nondumped sales are not ignored but are assigned the value of zero and combined with the dumped sales in calculating the overall margin. 926 F.Supp. 1138, 20 CIT

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Asahi, NSK Japan, and NSK Europe are "not bringing this action under any WTO agreement; rather, [they are] arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement." They are "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, 2001 WL 1012780, *3, 2001 Ct. Int'l Trade LEXIS 113 (Aug. 30, 2001). Thus, here as in the aforementioned cases, the Department's reliance on 19 U.S.C. § 3512(c) is an "erroneous technical bar." *Id.*

7. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, 2 Cranch 64, 2 L.Ed. 208 (1804).

at 570-71. The negative margin sales thus have the "effect of diluting the dumping margin, making the margin lower than it would otherwise be if . . . these sales were totally disregarded and were not given any credit in the analysis." *Id.* at 571-72, 926 F.Supp. 1138. Thus, Commerce does take into account non-dumped sales and has not interpreted U.S. statute in contravention of the WTO AD Agreement by employing its zeroing methodology.[8]

Because Commerce has employed the zeroing methodology in a manner which is reasonable in light of the WTO AD Agreement, this court defers to Commerce's interpretation and application of the U.S. statute and finds it to be in accordance with law.

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8. Based on distinguishing facts, Commerce's zeroing methodology was found to be reasonable by the Federal Circuit in *Timken*, 354 F.3d at 1344, even though the WTO Appellate Body found similar zeroing methodology used by the EC to be inconsistent with the AD Agreement Article 2.4.2 in *EC-Bed Linen*. While WTO adjudicatory decisions may be persuasive, they are not binding on Commerce or this court. *See* SAA at 1032; *Timken*, 354 F.3d at 1344; *Hyundai Elec. Co. v. United States*, 53 F.Supp.2d 1334, 23 CIT 302, 311 (1999). Indeed, they are not even binding on the WTO adjudicatory system as they do not have the *stare decisis* effect of common law. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round, Annex 2, vol. 31, 33 I.L.M. 1226 (1994), Article 3(2). "WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels." *Corus Staal*, 259 F.Supp.2d at 1264.

Appendix B

B

Commerce's Decision to Conduct Asahi's Administrative Review, though Asahi Was Not Properly Served Notification of the Review's Initiation, Is In Accordance With Law

Asahi claims that Commerce improperly initiated its administrative review of Asahi and should instead have rejected request for Asahi's review by Petitioner, Torrington Company. Issues and Decision Memorandum at 93. It argues that when Torrington requested a review of Asahi, it failed to notify Asahi of its request and that Asahi only learned of the request for review in the Initiation of Twelfth Administrative Review, 66 Fed.Reg. at 32,934. *Id.* at 93-94. Asahi explains that while the request for review has its correct address, the certificate of service did not show Asahi as having been served. *Id.* at 94. Asahi states that it immediately brought the insufficiency of service to Commerce's attention. Asahi's Motion at 11; *see* Letter from David A. Riggle to Ms. Holly Kuga, U.S. Department of Commerce, Import Administration (June 20, 2001). Asahi argues that, because Torrington did not follow the requirements of 19 C.F.R. § 351.303[9] and because it cannot argue that it

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9. The relevant parts of the 19 C.F.R. § 351.303 state:

Sec. 351.303 Filing, format, translation, service, and certification of documents.

. . .

(f) Service of copies on other persons. (1)(I) In general. Except as provided in § 351.202(c) (filing of

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made a reasonable effort to serve Asahi as it did not, Commerce should have rejected Torrington's request for review. Asahi claims that the delay in notification burdened it as it had not been involved in the immediately preceding review and "may have been the reason for the increase in the antidumping margin

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> petition), § 351.207(f)(1) (submission of proposed suspension agreement), and paragraph (f)(3) of this section, a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail.
>
> . . .
>
> (3) Service requirements for certain documents.
>
> . . .
>
> (ii) Request for review. In addition to the certificate of service requirements under paragraph (f)(2) of this section, an interested party that files with the Department a request for an expedited antidumping review, an administrative review, a new shipper review, or a changed circumstances review must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner by the end of the anniversary month or within ten days of filing the request for review, whichever is later. If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person.

calculated in the review. . . . At the very least it contributed to the partial Facts Available rate calculated in the preliminary results." Asahi's Motion at 14.

The Defendant-Intervenor Torrington cited *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review,* 62 Fed.Reg. 53808 (Oct. 16, 1997) and argued that due to the shortness of the delay in receiving the review request and to the fact that Asahi had participated in six previous reviews, Commerce's determination to treat the delay as harmless was within its discretion. Issues and Decision Memorandum at 94. Timken states that Commerce was right to conclude that Torrington made a reasonable effect to correct the omission by faxing the request on June 20, 2001, thus mitigating the mistake. Timken's Response at 52. It also claims that, because Asahi participated in the review, it waived its objection to the delay. Timken asserts that this delayed service constituted harmless error, if any. *Id.* at 53.

Commerce argues that it should not have rejected Torrington's request for review of Asahi. Torrington filed its request for an administrative review on the antidumping duty orders upon BBs and parts from France, Germany, Italy, Japan, and the United Kingdom on May 31, 2001. Defendant's Response at 22; *See* Letter from Law Firm of Stewart and Stewart: Request for Administrative Review on Behalf of Petition for Period 5/1/00-4/30/01 (May 31, 2001). Though Asahi should have been served with a copy of the request by June 10, 2001,

pursuant to 19 C.F.R. § 351.303, it did not receive formal notification until the publication of the Initiation of Twelfth Administrative Review on June 19, 2001. Defendant's Response at 23. Despite the delay in notification, Commerce did not issue its questionnaire until June 28, 2001 and thus "took no action to prejudice Asahi during the nine-day period which Asahi lacked notice." *Id.* at 25; Issues and Decision Memorandum at 94. Commerce argues that Torrington made a reasonable effort to serve Asahi with the request; because, after it realized it had made the error, it faxed Asahi a copy of the request on June 20, 2001. Issues and Decision Memorandum at 94. Commerce states that the Supreme Court has granted the judiciary as well as administrative agencies the discretion to relax and modify procedural rules if justice warrants it. Defendant's Response at 24 (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970)).

Commerce claims, pursuant to *Am. Farm Lines*, that two criteria need to be met for a Court to require an agency to abide strictly by its regulations. First, the regulations have to confer important procedural benefits. *Am. Farm Lines*, 397 U.S. at 538-39, 90 S.Ct. 1288. Here, 19 C.F.R. § 351.303 does not specify consequences for an untimely service of notice and, while Asahi argues that there is one exception to the service requirement, the regulation does not require Commerce to reject a request for review based on a deficient service. Second, the plaintiff must show substantial prejudice. *Id.* Asahi has not demonstrated substantial prejudice, because Commerce says "there is no prejudice in being denied

additional time to prepare, where such additional time is not provided for or even contemplated in the statute or the regulations." Defendant's Response at 28. Commerce thus argues that it does not accept Asahi's argument that it had insufficient time to prepare for the review and "the exemption of a foreign producer (Asahi) from an administrative review based upon a minor service technicality could potentially lead to an inaccurate dumping margin and the perpetuation of injury to the domestic injury that the antidumping duty statute was designed to prevent." *Id.* at 25.

Commerce was within its discretion to continue the administrative review of Asahi. The regulation at issue, 19 C.F.R. § 351.303(f)(3)(ii) (2001), states that in a request for an administrative review, the petitioner "must serve a copy of the request" to the "exporter or producer specified . . . within ten days of filing the request for review." The regulation provides an exception so that if the petitioner is unable to locate the exporter or producer, Commerce may still accept the request for review if it "is satisfied that the party made a reasonable attempt to serve a copy of the request on such person." 19 C.F.R. § 351.303(f)(3)(ii). The regulation, however, as Commerce points out, does not direct Commerce to rescind a review because service was faulty and neither provides for penalties nor instructs Commerce on what it should do in cases such as the one at hand. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 395-96 (Fed.Cir.1996) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary

course impose their own coercive sanction. . . . [There] is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.") (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63-64, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)).

The Supreme Court in *Am. Farm Lines* stated that

> "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

397 U.S. at 539, 90 S.Ct. 1288 (citing *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir.1953)). The regulatory notice requirement at issue is procedural, which is highlighted by the title of the regulation itself: "Filing, format, translation, service, and certification of documents." The Federal Circuit has held that Commerce's failure to comply with a regulatory notice requirement did not void the agency's action or compel the court to revoke the antidumping finding. *Intercargo Ins. Co.*, 83 F.3d at 396 (citing *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed.Cir.1995)). The court's reasoning in *Kemira Fibres* was that the Plaintiff "should not become immune from the antidumping laws

because Commerce missed the deadline. The national interest in the regulation of importation should not fall victim to an oversight by Commerce." 61 F.3d at 873.

As the regulation here was "not intended to confer important procedural benefits, . . . for Plaintiff to prevail on its procedural claims it must demonstrate that it was substantially prejudiced by Commerce's actions." *Taiyuan Heavy Mach. v. United States*, 23 CIT 701, 703, 1999 WL 816108 (1999). Asahi has not adequately shown that it was substantially prejudiced by the untimely service. Asahi had notice on June 19, 2001, from the Federal Register, that Torrington had requested its inclusion in the administrative review. *See Lyng v. Payne*, 476 U.S. 926, 942-43, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986) (citing 44 U.S.C. § 1507 stating that publication in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"). June 19, 2001, was only nine days after Asahi should have been notified by Torrington pursuant to the regulation, but Commerce did not issue its questionnaires, its first request for information from the parties in the review, until June 28, 2001.

As Asahi states, it was thus deprived of being able "to begin to prepare for" the review. However, "[a] party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice . . . means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo Ins. Co.*, 83 F.3d at 396. Here, nine fewer days of preparation time, prior even to the receipt of

Commerce's questionnaire, does not constitute such substantial prejudice that a remand is required on this issue. The public interest and domestic industry should not "fall victim" to such a procedural defect, if the oversight has not had a cognizable prejudicial impact on the Plaintiff. *Id.* Therefore, Commerce's determination to accept Torrington's request for the review of Asahi is in accordance with law.

C

Commerce's Use of Model-Specific Methodology In Calculating Cost of Production for Asahi is Supported by Substantial Evidence and Is In Accordance With Law

Asahi disputes Commerce's conclusion that Asahi made home market sales in substantial quantities at below the cost of production ("COP"). Referring to 19 U.S.C. § 1677(16) and Commerce's regulations in *Antidumping Duties: Countervailing Duties,* 62 Fed.Reg. 27,296, 27,412 (May 19, 1997), Asahi argue that the overall 20% below-cost determination has to be done on a foreign like product basis, as per 19 C.F.R. § 351.406, and not a model-specific basis. Issues and Decision Memorandum at 66. Because it claims that foreign like product refers to the overall product,[10] not individual

10. Commerce determined in the Original Investigation that there were five categories which comprised the "like product": ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings, and plain bearings. 54 Fed.Reg. at 18,998.

models, Asahi argues that the COP analysis should be based on total sales of ball bearings, those above as well as below cost. *Id.;* Asahi's Motion at 16-17. Asahi basis its claim of required aggregation on the distinction between the terms "foreign like product" in 19 U.S.C. § 1677(16) and 19 U.S.C. § 1677b(b) and "subject merchandise" in 19 U.S.C. § 1677b(a)(1)(A), arguing that the former term supposes a broader category beyond just the model of merchandise. Asahi further argues that because 19 U.S.C. § 1677b(b)(2)(C)(I) directs Commerce to examine whether below cost sales were made in substantial quantities, or over 20% of the total volume of sales, and this was not the case; thus, Commerce did not meet its statutory burden. Issues and Decision Memorandum at 66.

Torrington also referred to 19 U.S.C. § 1677b(b)(2)(C)(I) and argues that Commerce interprets the phrase "the volume of sales under consideration for the determination of foreign market" to refer to sales of the model it examined. *Id.* Torrington also argued that Commerce's interpretation of the statute conforms with its prior practice of the "10/90/10 test" in the *Use and Measurement of Production Costs Under U.S. Antidumping Law* at 9 (Sept. 19, 1995). *Id.*

Commerce states that it has a long standing policy of conducting the sales-below-cost test (know as the "10/90/10 test") on a model-specific basis. *Id.* at 67 (referring to *Policy Bulletin,* 92.3 (Dec. 15, 1992); *Policy Bulletin,* 94.1 (Mar. 25, 1994); SAA at 833); Defendant's Response at 31-32 (referring also to *Mitsubishi Heavy Indus. v.*

United States, 22 CIT 541, 563 (1998)). Commerce claims that after calculating COP as per 19 U.S.C. 1677b(b)(3), it tested whether home-market sales of the foreign like product were sold at prices below the COP within an extended period of time and in substantial quantities and whether the prices permitted the recovery of all costs within a reasonable period of time. Defendant's Response at 29. Commerce states that it compared model-specific COPs to the reported home-market prices less any movement charges, discounts, and rebates. *Id.* Commerce argues that the court's interpretation of 19 U.S.C § 1677(16) and 19 U.S.C. § 1677b(b) require a rejection of Asahi's distinction in breadth between "foreign like product" and "subject merchandise" and there is no basis for deviation from the precedent. *Id.* at 32, 33 (referring to *NSK, Ltd. v. United States*, 217 F.Supp.2d 1291, 1299-1300 (CIT 2002) & *Ausimont S.p.A. v. United States*, 2002 WL 31966590, *5, n. 6, 2002 Ct. Int'l. Trade LEXIS 154 (Dec. 17, 2002)). In accordance with 19 U.S.C. § 1677b(b)(2)(C)(I), Commerce thus says it disregarded Asahi's below-cost sales, as it found 20% or more of Asahi's sales being sold at prices less than COP. *Id.* at 31.

Commerce correctly used the model-specific methodology in disregarding sales below the COP. Pursuant to 19 U.S.C. § 1677b(b)(1) (2001):

> Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal

value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,

such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

The statute also states that:

Sales made at prices below the cost of production have been made in substantial quantities if—

> (I) the volume of such sales represents 20 percent or more of the

> volume of sales under consideration for the determination of normal value. . . .

19 U.S.C. § 1677b(b)(2)(C)(I). The applicable regulation concerning calculation of NV if sales are made below cost states:

> In determining normal value, the Secretary may disregard sales of the foreign like product made at prices that are less than the cost of production of that product. However, such sales will be disregarded only if they are made within an extended period of time, in substantial quantities, and are not at prices which permit recovery of costs within a reasonable period of time. (*See* section 773(b) of the Act.) This section clarifies the meaning of the term "extended period of time" as used in the Act.

19 C.F.R. § 351.406 (2001).

Commerce usually undertakes this substantial quantities test on a model specific basis. *Mitsubishi Heavy Indus.*, 22 CIT at 563. Under the statute, if 20% or more of sales of a specific model of the subject merchandise are below cost, Commerce can exclude them. *Id.* Commerce first set out its policy in the *Policy Bulletin*, 92.3 (Dec. 15, 1992), in which it interpreted the

then utilized "10/90/10 test,"[11] distinguishing the use of sales on a such or similar basis or model specific basis:

> If the purpose behind the COP provision of the law is to evaluate the rationality of exporters pricing practices, the such or similar approach is appropriate. The price of any model may be a function, among other things, of the price of other models. It is reasonable to believe that from time to time a producer will price certain models at less than COP, but be profitable overall. As an example, an automobile maker may offer low end cars below COP in order to build owner loyalty. In this case, the pricing decision is rational. Is it

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11. The *Policy Bulletin* explains the 10/90/10 test by saying that

> We compare the home market sales price of each model to the corresponding cost of production. Then we apply the 10/90/10 test to the home market sales of each model sold in the home market. If we find that less than 10 percent . . . of the sales of a model are made at less than cost, we include all home market sales of that model in the calculation of FMV. If between 10 and 90 percent . . . of home market sales of a specific model are made at less than cost, (assuming below cost sales occur over an extended period of time at less than cost recovery prices) we disregard those sales made at less than cost and use the above cost sales in the price comparisons. If more than 90 percent of home market sales of a model are made at less than cost (with the previous assumption), we disregard all sales of that model.

fair to look at the price of only one model when the prices are set on a product line basis?

If the purpose of the COP provision is to avoid basing FMV on prices below cost (with certain exceptions), the model specific methodology is appropriate, since it focuses on the prices actually used for FMV. FMV itself is based on a model specific comparison, that of the most similar model. In the price-to-price comparison, the prices of models that are not used in the comparison are irrelevant to the determination of FMV. Similarly, in the cost test, the fact that models not used for comparison are priced above or below cost is irrelevant to determining if the prices to be used for FMV are above or below cost.

We consider that the second method accords more with the departmental practice of calculating model specific FMVs than does the first, and 773(b) directs us to disregard below cost sales in calculating FMV.

The pre-URAA practice of performing the COP test on a model-specific basis was not changed with the enactment of the URAA, as is apparent in the SAA: "[a]s under current practice, the cost test generally will be performed on no wider than a model-specific basis." SAA at 832. By keeping the model-specific methodology for the COP test, Commerce can ensure that respondents do not price their different models in such a way as to

be profitable overall and dump goods into the U.S. market simultaneously. Thus, Commerce's decision to use a model-specific methodology is in accordance with law.

Additionally, Asahi's argument that the terms "subject merchandise" and "foreign like product" are used differently in 19 U.S.C. § 1677b(a) and 19 U.S.C. § 1677b(b) and thus lend to a different scope of product treatment, respectively, does not hold water. First, Commerce and Timken point out that 19 U.S.C. § 1677(16) does not describe three separate classes of goods which are subsets of "foreign like product;" instead it provides a hierarchical preference for defining "foreign like product." *See* Defendant's Response at 33. For, in *Ausimont,* this court stated that

> "Foreign like product" means, in descending order of preference, (1) "identical" merchandise, (2) "like" merchandise that is of approximately equal commercial value, component material, and use, and is produced by the same person and in the same country, or (3) "like" merchandise that is of the "same general class or kind" and use, and is produced by the same person and in the same country.

2002 WL 31966590, *5, n. 6 (citing 19 U.S.C. § 1677(16)). Under the statute, Commerce must first look at identical merchandise, which it found here, and use it in its below-cost sales test.

Second, Timken makes a convincing argument that taking a model-specific interpretation of the statute is appropriate because "the substantial quantity test is a sub-part of the cost test itself." Timken points out that in *SKF USA v. United States*, 263 F.3d 1369, 1382 (Fed.Cir.2001), the Federal Circuit held that there is a rebuttable presumption that "foreign like product" should be defined consistently, especially where both sections are involved in the same calculation: this is the case with 19 U.S.C. § 1677b(b)(1) and 19 U.S.C. § 1677b(b)(2)(C)(I) which are both used to determine the home market price (NV). *See* Timken's Response at 48. Finally, Commerce accurately points out that finding a difference between the terms "foreign like product" and "subject merchandise" is contrary to law.

The court agrees with Commerce's reasoning that using the congruent definition of these terms in this context provides for the most accurate dumping margins to be calculated and prevents the calculation of NV based on prices below cost. By using the most specific classification uniformly through the process, Commerce can examine the pricing of a specific type of merchandise and disallow price adjustments among a companies' products. For the stated reasons, the court upholds Commerce's application of the model-specific below cost test to Asahi.

Appendix B

D

Isuzu Is Not Allowed to Rely On Proprietary Information To Support Its Corroboration Argument, After It Failed to Get Timely APO Access In the Underlying Review

Commerce argues that Isuzu has attempted to rely on proprietary information that it did not have access to during the administrative review without exhausting its administrative remedies. Defendant's Response at 36. Commerce states that Isuzu made an untimely request for an administrative protective order ("APO") which Commerce denied under 19 C.F.R. § 351.305(b)(3);[12] Isuzu did not appeal. Thus, Isuzu's corroboration arguments regarding the use of adverse facts available were supported by public, non-APO material. Commerce states that, at the commencement of this litigation, Isuzu gained access to APO material through a judicial

12. Section 351.305(b)(3) states

> To minimize the disruption caused by late applications, an application should be filed before the first questionnaire response has been submitted. Where justified, however, applications may be filed up to the date on which the case briefs are due, but any applicant filing after the first questionnaire response is submitted will be liable for costs associated with the additional production and service of business proprietary information already on the record. Parties have five days to serve their business proprietary information already on the record to applicants authorized to receive such information after such information has been placed on the record.

protective order ("JPO") pursuant to USCIT Rule 71(c). *Id.* at 40. Commerce thus argues that it has not had the opportunity to consider Isuzu's arguments which it has now supported by proprietary information obtained under the JPO. *Id.* at 37. Commerce argues that the doctrine of exhaustion requires Isuzu to present claims to the administrative agency before raising them with the court. *See* 28 U.S.C. § 2637(d); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed.Cir.1998). None of the exceptions to the doctrine, argues Commerce, applies. *See Rhone Poulenc, S.A. v. United States*, 583 F.Supp. 607, 610 (CIT 1984). Because of Isuzu's failure to make a timely APO application and to appeal the APO denial, it cannot use new information to circumvent the administrative process and bolster its arguments before the court. Timken agrees with the Government's argument.

Isuzu argues that Commerce's argument confuses access to proprietary information and a failure to exhaust administrative remedies. It claims that it "presented the same fundamental corroboration argument to the Department in the administrative review as is now before the Court. Simply because Isuzu did not have access to proprietary information, to include it in its argument does not change the nature of the argument." Reply Brief of Plaintiff Isuzu Motors, Ltd. ("Isuzu's Reply") at 17. Isuzu argues that USCIT Rule 71(c) (2001) contemplates the present scenario in its Form 17 certification, part 3, which states:

> I was not . . . subject to an administrative protective order in the administrative

> proceeding which gives rise to this action. All parties to this action and interested parties who are entitled to service of this Certification pursuant to Rules 5 and 71(c)(5) of the United States Court of International Trade are listed below:
>
> . . .
>
> Each of these parties or interested parties has been contacted; none has objected to mu access to proprietary information in this action subject to the Appendix on Access to Business Proprietary Information Pursuant to Rule 71(c) to the Rules of the Court of International Trade.

Thus, Isuzu claims that if Commerce did not find it appropriate for Isuzu's counsel to present arguments using proprietary information, it should not have consented to Isuzu's JPO request and thus have effectively waived the exhaustion argument. Isuzu's Reply at 18.

Under these circumstances, Isuzu may not use information to which it did not have access pursuant to the APO and subsequently received through the JPO to support its arguments. Isuzu's conduct here appears to have been an intentional decision on its part. It erroneously argues that Commerce by consenting to the JPO waived its exhaustion argument. A waiver is an "intentional relinquishment or abandonment of a known

right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Former Emples, of Quality Fabricating, Inc. v. United States*, 343 F.Supp.2d 1272, 2004 WL 1059509, *12 (2004). Counsel for the U.S. Government during the July 7, 2004, oral argument denied the Government had intended to waive any rights in granting the JPO access.[13] The JPO is designed to give parties access to information, but access to information does mean that the information is useable for all purposes. Isuzu may not rely on proprietary information to support its corroboration argument that it did not have access to pursuant to the APO without first exhausting its administrative remedies.

E

Commerce's Determination to Base its AFA Rate On the Highest Calculated Rate and Corroborate Based on Contemporaneous Sales Information, Because Isuzu was Not Cooperative During the Review, Is Supported by Substantial Evidence and Is In Accordance With Law

Isuzu, as an original equipment manufacturer (OEM) reseller of BBs to the U.S. market, disputes Commerce's

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13. Counsel elaborated, saying that the granting of JPO access was not a question of waiver because the Government did not object to Isuzu's JPO access and the court's rules allow it. Rather, counsel stated that "because of the way [Isuzu] did not participate in this review and . . . played the system to only participate once they found out they weren't happy with the rate they should not be allowed to rely upon that information to make arguments they did not make during the administrative proceedings."

imposition of a 73.55% AFA rate. Isuzu argues that the rate chosen, the highest rate for a manufacturer based on partial best information available ("BIA") from the original investigation and its corroboration by examining transaction-specific margins of a cooperating Japanese manufacturer in the present review, is erroneous. Issues and Decision Memorandum at 5. Isuzu argues that it is insufficient for Commerce to say it "has corroborated the adverse factual interferences it uses or 'cherry pick' select sales arbitrarily and call this corroboration." Plaintiff Isuzu's Motion for Judgment upon the Agency Record ("Isuzu's Motion") at 13. Relying on *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) and *Am. Silicon Techs. v. United States*, 240 F.Supp.2d 1306, 1312 (CIT 2002), Isuzu argues that the AFA rate chosen is not a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." Issues and Decision Memorandum at 5; *see* Isuzu's Motion at 11-12.

Isuzu states that because there are Japanese BBs manufacturers, OEM resellers, and trading companies involved in this review, Commerce should recognize the distinctions between them in choosing an AFA rate. Issues and Decision Memorandum at 5; Isuzu's Reply at 19-20. On the one hand, the margins calculated for OEM resellers, Isuzu argues, have typically been among the lowest with rate ranging from .04% to 2.33% and as high as 3.84%; the only rate calculated for Isuzu was .92%. Isuzu's Reply at 19-20. On the other hand, margins for cooperating Japanese BBs manufacturers have

ranged from .01% to 48.69%. Furthermore, Isuzu claims that the 73.55% partial-BIA rate was derived from a section of law that has been amended by the URAA because it was creating punitive margins and thus discredits its use in calculating the AFA rate. Issues and Decision Memorandum at 5; Isuzu's Motion at 15. Finally, Isuzu argues that the imposition of an AFA rate using data from twelve year old transactions reduces significantly its probative value for current transactions. Issues and Decision Memorandum at 5; Isuzu's Motion at 16-17. Isuzu thus suggests that Commerce impose a margin rate of 48.69% which was the margin calculated for Nachi in the original investigation.[14] *Id.* at 27.

Commerce argues that, because Isuzu chose not to participate in this review, though having been notified that this decision would result in an imposition of an AFA rate, it was justified in applying a total AFA rate based on the highest rate calculated for any company in any segment of this proceeding. Issues and Decision Memorandum at 6 (referring to Commerce's Memorandum to File (August 31, 2001)). Commerce justifies the use of the 73.55% rate by showing that it derived it during the preliminary stage of the Original Investigation using the petition rate for BIA to analyze

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14. Commerce did not choose the margin calculated for Nachi in the original investigation because it chose the highest calculated rate for any company in any portion of this antidumping investigation and the subsequent reviews: that of Koyo Seiki in the Original Investigation. Nachi's current transaction-specific margins was used purely to corroborate the AF'A rate.

specific home-market sales to unrelated parties. *Preliminary Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Taper Roller Bearings) and Parts Thereof from Japan*, 53 Fed.Reg. 45,343, 45,346 (Nov. 9, 1988). The BIA rate applied in the final determination of the Original Investigation was as a result of Koyo's, a BBs manufacturer, submission of a new response just prior to verification. Original Investigation, 54 Fed.Reg. at 19, 102; *Final Determination of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Taper Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed.Reg. 18,992, 19,033 (May 3, 1989).

Commerce argues that the "selection of the highest rate calculated for any company in any segment of this proceeding as an adverse facts available rate is consistent with out past practice." Issues and Decision Memorandum at 6 (referring to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 65 Fed.Reg. 49,219 (Aug. 11, 2000) (*"AFBs 10"*)). Commerce states that nothing on the record limits Commerce's ability to choose dumping margins from any particular types of respondents. Commerce claims to have corroborated the AFA rate with current transaction-specific margins from Nachi Japan, a BBs manufacturer, which it also claims is consistent with past practice. *Id.* at 7. In its review, Commerce found a number of sales with dumping

margins at or above 73.55% which were substantial whether considering the number of transactions, value of transactions, or quantity of transactions. *Id.* Thus, the AFA rate selected for Isuzu is relevant, continues to have probative value, and is not unduly harsh or punitive. *Id.*

The Defendant-Intervenor, Timken, argues that, as Isuzu was an uncooperative respondent, Commerce's use of an adverse inference and the 73.55% AFA rate was appropriate. Timken argues that, while 19 U.S.C. § 1677e(c) discusses corroboration, it is not absolute because the statute states "to the extent practicable." Timken's Response at 77. Timken also rebuts Isuzu's reliance on *De Cecco* and *Am. Silicon Techs.;* in those cases, although Commerce imposed an AFA rate, the respondents had in fact responded to Commerce's questionnaires, but had done so in an insufficient manner. *Id.* at 78-80. Here, Isuzu refused to respond to the questionnaire. Timken argues that Commerce acceptably calculated the rate derived from Koyo's margin in the original investigation; its use of margins from 1989 are permitted by statute, *see Reiner Brach GmbH & Co. KG v. United States,* 206 F.Supp.2d 1323, 1339 (CIT 2002); and that Commerce utilized margins from producers for calculating the margin is within Commerce's discretion for an uncooperative respondent. *Id.* at 81-83. Finally, Timken claims that the margin Commerce chose was neither derived through "cherry picked" claims nor was unduly punitive: the responses of "Nachi and Koyo are more or less 'probative' of the potential current margin for Isuzu . . . as the record contains no evidence regarding Isuzu's current sales." *Id.* at 83.

Appendix B

Commerce's statutory mandate is to determine dumping margins as accurately as possible. *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F.Supp.2d 1305, 1317 (CIT 2001). Commerce must thus gather accurate data from respondents, having given respondents a reasonable opportunity to participate in the review. *See Bowe-Passat v. United States*, 17 CIT 335, 339 (1993). Ultimately, respondents have the responsibility of creating an adequate record. *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 806 F.Supp. 1008, 16 CIT 931, 936 (1992). Commerce, however, has the statutory authority to use facts otherwise available, subject to 19 U.S.C. § 1677m(c)(1),[15] (d),[16] and (e)[17] if

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15. 19 U.S.C. § 1677m(c)(1)states that

> If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

16. Pursuant to 19 U.S.C. § 1677m(d)

> If the administering authority or the Commission determines that a response to a request for information

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Appendix B

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under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

17. Pursuant to 19 U.S.C. § 1677m(e)

In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

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(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified as provided in section 782(I),

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(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

> the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a) (2001); *Reiner Brach*, 206 F.Supp.2d at 1329-30. If Commerce acts in accordance with its statutory requirements and uses total facts available, but finds that

> an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition;
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or

> (4) any other information placed on the record.

19 U.S.C. § 1677e(b); *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed.Cir.2003). When Commerce applies an adverse inference, it "needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation." *Mannesmannrohren-Werke AG v. United States*, 77 F.Supp.2d 1302, 1313-14 (CIT 1999). If Commerce adequately supports these two findings, the court will find that Commerce's use of an adverse inference is supported by substantial evidence. *Id.*

When a respondent fails to respond to Commerce's requests and the information it requested is material to the investigation, this court has found such behavior to be unreasonable and the use of AFA appropriate. *See Branco Peres Citrus, S.A. v. United States*, 173 F.Supp.2d 1363, 1374-75 (CIT 2001); *Am. Silicon Techs.*, 240 F.Supp.2d at 1311. In the case of uncooperative respondents, it is within Commerce's discretion to choose the secondary bases on which it will rely to support its use of adverse inferences;

> [p]articularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its

> investigations and assure a reasonable margin. Commerce's discretion in these matters, however, is not unbounded.

De Cecco, 216 F.3d at 1032. Section 1677e(b) is geared to promote cooperation by respondents, but not impose "punitive, aberrational, or uncorroborated" margins; this is evidenced in the 19 U.S.C. § 1677e(c) corroboration requirement which intends the AFA rate "to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032. Thus, the margin selected by Commerce must have some relation to the respondent's dumping margin. At issue in this case is whether Commerce's levying of the particular AFA rate of 73.55% is in accordance with the law because "[t]here is no dispute that Isuzu failed to respond to the Department's questionnaire in the administrative review." Isuzu's Reply at 4. Isuzu does not contest the use of AFA but instead contests the manner in which it was applied and the rate that was chosen.

The court upholds Commerce's imposition of a 73.55% AFA rate on Isuzu. Pursuant to 19 U.S.C. § 1677e(b) and 19 C.F.R § 351.308(c),[18] Commerce may

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18. As per 19 C.F.R. § 351.308(c),

> (1) Secondary information, such as information derived from:
>
> (i) The petition;

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rely on secondary information[19] from the petition, a final determination in an investigation, previous reviews, and any other information placed on the record to draw its adverse inference.

Here, Commerce chose, consistent with the statute, Koyo's margin which was a part of the final determination from the Original Investigation. While Isuzu argues that Commerce should have taken into account that Isuzu is an OEM reseller and Koyo is a BBs manufacturer in determining the dumping margin, nothing in the statute or the applicable regulation limits Commerce's discretion to choose a surrogate rate based on the type of respondent. Furthermore, as Isuzu refused to participate in the review, it cannot be presumed that Isuzu was not conducting business as a BBs producer or trader. This court has repeatedly held that Commerce's special expertise makes it the "master" of antidumping

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> (ii) A final determination in a countervailing duty investigation or an antidumping investigation;
>
> (iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or
>
> (2) Any other information placed on the record.

19. "Secondary information" is defined in the SAA at 870 as "information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise."

law, entitling its decisions to great deference from the courts. *Heveafil Sdn. Bhd. v. United States,* 58 Fed.Appx. 843, 847 (Fed.Cir.2003); *Melamine Chems., Inc. v. United States,* 732 F.2d 924, 929 (Fed.Cir.1984). This court thus defers to Commerce's choice of Koyo's margin as a surrogate rate for Isuzu.

Upon determining that it will use secondary information to draw an adverse inference, Commerce is faced with a corroboration requirement as per 19 U.S.C. § 1677e(c) and the applicable regulation 19 C.F.R. § 351.308(d):

> Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

Commerce states in the current review that it corroborated its choice of Koyo's rate from the Original Investigation with that of current transaction-specific margins for Nachi Japan. Once again, neither the statute nor the regulation prevents Commerce from using Nachi Japan's margin for this purpose. Furthermore, as Timken points out, pursuant to the "to extent practicable" language in 19 U.S.C. § 1677e(c) and "[t]he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question" language in 19 C.F.R. § 351.308(d), the corroboration requirement itself is not mandatory when not feasible. In this case, Commerce had no current information for Isuzu because Isuzu refused to participate in the review and it used Nachi's rate consistent with its past practice of comparing margins on individual sales by respondents. *See* Issues and Decision Memorandum at 7. Because of Isuzu's noncooperation, Commerce has leeway in calculating the applicable AFA rate and Isuzu cannot pick and choose which rate it feels would be more appropriate in the circumstance.

F

Commerce's Determination, Challenged by MPB, to Accept NTN's Reported Cost Data is Supported by Substantial Evidence

MPB argues that Commerce should verify NTN's reported cost data before accepting it for the final

results, or alternatively, that Commerce should make the appropriate adjustments on a facts available basis. Issues and Decision Memorandum at 67. MPB claims that NTN's cost data varies starkly from year to year: "changes in costs from the 11 to the 12 review ranged from a decrease of more than [a percentage] to an increase of over [a percentage]; changes in constructed values ranged from a decrease of more than [a percentage] to an increase of over [a percentage]." MPB Corporation's Rule 56.2 Motion for Judgment on the Agency Record ("MPB's Motion") at 6. MPB also argues that while indirect expenses can vary without any apparent justification, costs of labor and materials should not vary so much unless there are changes in technology or some other condition. Issues and Decision Memorandum at 67. MPB also argues that NTN just referred to Attachment D-1 of its section D questionnaire response with no further explanation in responding to MPB's pre-preliminary comments. *Id.* MPB says that, while NTN responded to Commerce's questionnaire by explaining its variance system, NTN did not explain the "radical increases and decreases reported." MPB's Motion at 9. Thus, MPB argues, while Commerce correctly requested further information specifically about costs from NTN through a supplemental questionnaire at MPB's behest, Commerce's determination to accept NTN's reported costs was not supported by substantial evidence. MPB says that this issue should be remanded to Commerce for further investigation and/or the use of facts available.

Appendix B

NTN argues that it reported its cost data accurately and does not deserve an imposition of facts available. Issues and Decision Memorandum at 67. NTN claims that it was not asked about the cost variances for the 1999-2000 and 2000-2001 administrative reviews and that MPB cannot claim it was unresponsive when Commerce never requested the information. *Id.* NTN also states that MPB speculates on the causes of the COP variations without an understanding of NTN's cost calculation methods. *Id.* at 68. NTN states that it reviews its standard costs every half fiscal period and actual cost is calculated by multiplying the standard cost by the variance ration even in situations of non-production. *Id.* at 67-68. NTN argues that Commerce has verified and found NTN's accounting method to be accurate in prior reviews. *Id.* at 68.

Commerce states that NTN responded adequately to its supplemental questionnaire regarding its change in costs between the 11 and 12 administrative reviews. It responds to MPB that NTN's reference to Attachment D-1 was an attachment to its January 3, 2002, supplemental response and not its Section D questionnaire. *Id.* Commerce argues that though it did not verify NTN's cost information, its submitted data was subject to verification. Commerce thus states that it had no reason to reject NTN's explanation of its costs or employ facts available. *Id.*

Commerce had discretion to accept NTN's reported cost data in calculating its dumping margin in the Preliminary Results and Final Results of this review.

Appendix B

On August 31, 2001, NTN submitted questionnaire responses with information concerning COP and constructed value ("CV"). On November 21, 2001, MPB submitted its analysis of NTN's Section D questionnaire, drawing attention to NTN's decrease in costs between the current and previous reviews. On November 29, 2001, Commerce sent NTN a supplemental questionnaire to which it responded on January 3, 2002. MPB filed a letter again citing that NTN's responses were deficient and NTN filed a rebuttal letter on February 14, 2002. MPB and NTN again filed letters with Commerce regarding NTN's cost data on March 14 and 26, 2002, respectively.

Commerce gathered sufficient information to conclude that NTN explained adequately the variances in its costs. In its Section D questionnaire, NTN explained its general cost accounting methodology as well as how changes in its plants and processes affected its reported costs. Defendant's Response at 59. Commerce also notes that "[i]n response to [its] supplemental questionnaire regarding how NTN's cost variances resulted in changes in reported costs, both generally and for specifically requested product categories, NTN provided a detailed explanation of its variance calculation methodology for the specific product categories." *Id.* Commerce claims that it was able to get this information through NTN's reference to its Attachment D-1 to its supplemental questionnaire response. Commerce thus did not have good cause to verify NTN's cost data or to apply facts available. *Id.* at 63.

If appropriate, Commerce has discretion not to verify the information it receives. *See, e.g., Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1383 (Fed.Cir.2001). Commerce requested information from NTN in a supplemental questionnaire and NTN provided answers to the questions it was asked, which Commerce deemed sufficient. Commerce here has articulated a "rational connection between the facts found and the choice made." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). Therefore, Commerce's decision to accept NTN's reported cost data is supported by substantial evidence.

G

With Regards to NSK Europe, Commerce Has Properly Interpreted "Foreign Like Product" for Calculating Constructed Value

NSK Europe argued that Commerce erroneously calculated CV-profit because it should have interpreted and applied the term "foreign like product" in a consistent fashion in the CV-profit and price contexts. NSK Europe's Motion at 14.[20] Commerce and Timken

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20. NSK Europe, however, concedes in its Reply that a Federal Circuit case cited by both the Defendant and Timken, *Fag Kugelfischer Georg Schafer v. United States*, 332 F.3d 1370 (Fed.Cir.2003), is applicable to this case as it pertains to the issue of "foreign like product" and provides adverse precedent to its position. NSK Europe's Reply at 7. NSK Europe further states

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point out that *FAG Kugelfisher* affirmed Commerce's methodology with respect to its differential use of the term "foreign like product" for calculating CV profit.

In *Fag Kugelfischer,* the Federal Circuit upheld Commerce's application of different subparts of 19 U.S.C. § 1677(16)[21] to define "foreign like product" in

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that it had petitioned the Federal Circuit for rehearing, but "if the petitions for rehearing are denied and the decision in *Fag Kugelfischer* upheld, NSK Europe accepts the Federal Circuit's ruling on this matter." NSK Europe's Reply at 7. During the July 7, 2004, oral argument, counsel for NSK Europe stated it was "withdrawing [the] particular claim based upon . . . *FAG Kugelfischer.*"

21. Pursuant to 19 U.S.C. § 1677(16):

> Foreign like product. The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of subtitle B of this title [19 USCS §§ 1673-1671h] can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,

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the same administrative proceeding. 332 F.3d at 1373. The Federal Circuit stated:

> Section 1677(16) . . . offers three alternative definitions for foreign like product, which increase in the scope of products that may be included. See 19 U.S.C. § 1677(16). The first available category of merchandise, with which differing determinations may be satisfactorily made, is to be applied. Id. There is no restriction that Commerce use just one subsection per proceeding. Id. Accordingly, we believe that Commerce reasonably explained that the determinations for the variables at issue require different sets of foreign like product data. The bearing market, with its wide disparity in

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> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

> products, necessitates that direct price comparisons be done on a model-by-model basis. Therefore, the use of price comparisons requires the identical model and product family data of sections 1677(16)(A) and (B). And CV profit may be based on a broader scope of products because use of aggregate data, as described in section 1677(16)(C), results in a practical measure of profit that can be applied consistently and with administrative ease over the range of included products.

Id. In this review, as in *Fag Kugelfischer,* Commerce defined foreign like product for price purposes according to 19 U.S.C. § 1677(16)(A) & (B) and "used data from sales of identical or the same family of products." Defendant's Response at 65. Commerce then applied a broader definition of foreign like product for CV purposes under 19 U.S.C. § 1677(16)(C) which includes merchandise "of the same general class or kind as the subject merchandise." *Id.* Commerce states that it applied a broader definition because Congress expressed that 19 U.S.C. § 1677b(e)(2)(A) was a preferred methodology for calculating CV. *Id.*

NSK Europe did not distinguish this case from *Fag Kugelfischer* in a way that would justify an alternate result.[22] This court sustains Commerce's methodology as reasonable and not overbroad. *See Fag Kugelfischer,* 332 F.3d at 1374.

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22. The Federal Circuit denied its petition for rehearing. *Fag Kugelfischer,* 332 F.3d 1370, *reh'g denied,* 2003 U.S.App. LEXIS 19511 (2003) and, as stated above, counsel for NSK Europe withdrew the claim.

Appendix B

H

Commerce's Use of AFA in Calculating NTN's Home Market and Freight Expenses Is Supported by Substantial Evidence and Is in Accordance with Law

MPB argues that Commerce correctly applied AFA to NTN's reported home market and U.S. inland freight expenses. MPB states that NTN's sales value method is not the most accurate because insurance, which is paid on a value basis, is an expense reported separately and, furthermore, there is no evidence that expensive bearings are more costly to ship than cheaper ones. Issues and Decision Memorandum at 74. MPB claims that NTN was a noncooperative respondent because it refused to comply with Commerce's request to report the weight of the BBs which is "a logical basis for allocating freight cost for products such as AFBs and is probably more reasonable than sales value." *Id.* Thus, MPB argues that NTN should not benefit from its noncooperation and that Commerce should impose an AFA rate.

NTN states that it did report its freight expenses as per Commerce's requirements and to the best of its ability. *Id.; see* NTN's Rule 56.2 Motion and Memorandum for Judgment on the Agency Record Submitted on Behalf on Plaintiffs, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation ("NTN's Motion") at 6. NTN says that it submitted evidence on the record

showing how its freight expenses are calculated and that, because it does not maintain data on weight and its weight information is not computerized per bearing, it was not able to calculate freight on a weight basis. Issues and Decision Memorandum at 74; NTN's Motion at 7. Furthermore, NTN claims that its invoices show that freight expenses are incurred on the basis of many factors other than weight, "because multiple variable are used, which are not uniform for each sale"; it calculates its home market freight expenses "based on sales price and allocates its U.S. freight expenses based on value" because that is the only factor common to all shipments. Issues and Decision Memorandum 74-75; NTN's Motion at 7. Arguing that larger BBs are more expensive than smaller ones, NTN states that, contrary to MPB's assertion, there can be a correlation between price and weight. Issues and Decision Memorandum at 75. NTN argues that Commerce accepted this allocation methodology in all previous reviews other than the 1999-2000 review. *Id.* As a result, NTN argues that Commerce should accept its reported allocation of home market expenses and not apply AFA.

Commerce states that, pursuant to 19 C.F.R. § 351.401 and 19 C.F.R. § 351.402, NTN failed to justify its use of sales value as an allocation methodology. In addition to not being able to justify its allocation methodology, Commerce had asked NTN to report per-unit weight for its BBs in the original and supplemental questionnaires which Commerce had asked it to include in its home-market and U.S. sales database. NTN, Commerce argues, refused to provide this information

again claiming that it did not use weight to calculate its freight expenses though it offers this data in its product brochures.[23] *Id.* at 77-78.

Because NTN withheld information from Commerce twice (in the original and supplemental questionnaires) and failed to act to the best of its ability to explain fully how its allocation methodology based on sales value was not distortive, Commerce deemed appropriate the use of facts available and an adverse inference pursuant to 19 U.S.C. § 1677e. *Id.* at 78. Commerce also found that because NTN had incurred freight costs, replacing all its home market freight expenses would be inappropriate; Commerce instead calculated NTN's adverse rate based on record information under 19 U.S.C. § 1677e(b)(4) and 19 C.F.R. § 351.308(c)(2). *Id.* With respect to freight on NTN's U.S. sales, Commerce "assumed that inland-freight expenses that NTN incurred during the POR were incurred for subject merchandise and allocated the total freight expense to those sales." *Id.* at 79.

Timken supports Commerce's imposition of AFA to NTN's home market and U.S. freight expenses because NTN used allocation methodology based on sales value. Timken argues that Commerce was correct to state that allocation by weight is less distortive. Timken's Response at 59. Furthermore, argues Timken,

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23. Commerce notes that "the size of the sales databases and number of models prevents us from incorporating the weights from NTN's product brochure in the sales database." Issues and Decision Memorandum at 78.

> there is no reason in practical experience to believe that freight expense correlates to value. Allocation by value results in under-allocation of freight costs and lower-price sales. U.S. sales at dumped prices (vs. non-dumped U.S. sales) will be allocated lower freight costs, thus understating margins. Conversely, in the home market, higher-priced sales will be allocated higher freight adjustments, reducing normal value.

Timken's Response at 60. Timken also argues that Commerce correctly used its discretion to apply partial AFA because of NTN's lack of cooperation. Moreover, even though Commerce had accepted NTN's methodology in the past, it was not bound to adhere to it. *Id.* at 66 (citing *NSK Ltd. v. United States*, 896 F.Supp. 1263, 19 CIT 1013, 1027 (1995)).

Commerce justifiably rejected NTN's allocation methodology and applied AFA to the calculation of NTN's home market and U.S. freight expenses. First, regarding the allocation methodology, pursuant to 19 U.S.C. § 1677a(c) (2001),[24] Commerce is directed to

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24. Under 19 U.S.C. § 1677a(c), Adjustments for export price and constructed export price:

> The price used to establish export price and constructed export price shall be—
>
> (1) increased by—
>
> (A) when not included in such price, the cost of all containers and coverings and all other

(Cont'd)

adjust the EP or CEP in certain circumstances. Under the applicable regulation, 19 C.F.R. § 351.401(b)(1) (2001), the burden for demonstrating the "amount and nature of the particular adjustment" falls on the "interested party that is in possession of the relevant information." Under § 19 C.F.R. § 351.401(g)(1),

(Cont'd)

> costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and
>
> (C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy, and
>
> (2) reduced by—
>
> (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and
>
> (B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C).

Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions." The party seeking Commerce's approval of its allocation and adjustment methodology must "demonstrate to [Commerce's] satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2). To reach its conclusion, Commerce must consider records kept by the interested party and general accounting standards used in that country and industry. 19 C.F.R. § 351.401(g)(3). Thus, based on the regulation, it is within Commerce's discretion to allow or disallow the allocations and adjustments requested. *NTN Corp.*, 306 F.Supp.2d at 1328.

Commerce acted within its discretion to reject NTN's allocation methodology based on sales value instead of by weight. In this review, Commerce requested information on NTN's allocation methodology even though it had not done so prior to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed.Reg. 36,551 (July 12, 2001) (*"AFBs 11"*) and had previously accepted the methodology.[25] Issues

25. Although NTN argues that Commerce had accepted its allocation methodology in the past, in fact NTN had refused to supply information concerning its allocation methodology in the previous review, *AFBs 11*, and Commerce had applied an adverse inference. *See* Issues and Decision Memorandum at 77.

and Decision Memorandum at 77; *see* Defendant's Response at 77. Commerce acknowledges this shift and it "has discretion to change its methodology, so long as its decision is reasonably supported by the record." *NTN Corp.*, 306 F.Supp.2d at 1328.

The record here supports Commerce's position that weight is a more appropriate basis for allocation. Weight is not the *only basis* upon which NTN incurs freight expenses, and Commerce found that the evidence on the record *does not show that sales price is a factor* on which NTN incurs freight expenses. Issues and Decision Memorandum at 76 (emphasis added); *see* Defendant's Response at 74. Commerce found that allocating freight costs based on weight may include distortions; however, the methodology is less distortive than one that allocates costs on a basis which, based on the record evidence, no freight expenses are incurred. Issues and Decision Memorandum at 76. Commerce argues that when it asked NTN in a supplemental questionnaire to explain how its methodology was not distortive, it gave insufficient answers arguing that sales value was common to all shipments, freight expense was not allocated by weight, and that its records do not allocate expenses based on weight. *Id.* (referring to NTN's January 3, 2002, supplemental questionnaire response at pages B-1 and C-2). Commerce found the first argument could be used for weight, while the second was illogical, and the third argument was false as NTN's product brochure lists weight for all of its BBs. *Id.* at 76-77. Commerce further found suspect NTN's argument that larger BBs are more costly than smaller ones and

thus value-based allocation is just as reasonable as one based on weight. *Id.* at 77. Based on an assessment of the record, Commerce arrived at a reasonable conclusion. Thus, Commerce's refusal to accept NTN's allocation based on sales value rather than weight is supported by substantial evidence.

Commerce also was within its discretion to impost partial AFA to NTN's home market and U.S. freight expenses. As explained above, pursuant to 19 U.S.C. § 1677e(a)(1)-(2), Commerce can, among other situations, employ "facts available" in an antidumping proceeding if "necessary information in not available on the record" or if an interested party "withholds" or "fails to provide" information requested. If Commerce finds that the party has "failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). To draw this adverse inference, the statute and applicable regulation grant Commerce the ability to rely on the petition, a final determination in the current investigation, any previous review or determination, or "any other information placed on the record." 19 U.S.C. § 1677e(b)(1)-(4); 19 C.F.R. § 351.308(c).

In this review, Commerce presented NTN with an opportunity to explain why its allocation methodology was not distortive, but NTN did not submit adequate responses to the original or supplemental questionnaires. Commerce requested in both questionnaires that NTN

provide per-unit weights for its BBs, including the data in its home-market and U.S. sales database, but NTN apparently did not comply and instead replied that it did not use weight in the calculation of its freight expenses. Commerce had the authority to use facts available here because it did not have the requisite information from NTN to conduct this review. And, it rightly used an adverse inference after two specific requests for information for which NTN did not provide useable data. While it was within Commerce's discretion to use any information to support its adverse inference, Commerce chose information that NTN itself had reported. The AFA freight rates with respect to home market freight expenses Commerce chose are most appropriate because it based the rates on the figures NTN submitted from its cost centers in its questionnaire responses. Issues and Decision Memorandum at 78-79. Also, for freight on NTN's U.S. sales, Commerce choice of data was reasonable because it incorporated the data NTN reported during the review along with an adverse inference. *Id.* at 79. Commerce has calculated the antidumping margin in the most accurate way possible. *See Rubberflex Sdn. Bhd. v. United States*, 59 F.Supp.2d 1338, 1346 (CIT 1999). Therefore, Commerce's use of AFA in calculating NTN's home market and U.S. freight expenses is supported by substantial evidence and is in accordance with law.

Appendix B

I

The Court Grants Commerce a Remand To Correct Its Clerical Errors Concerning the Treatment of NTN's Freight and Warehouse Expenses

NTN argues that there were clerical errors in the amended final results computer program that affected the accuracy of the NTN's dumping margin. NTN's Motion at 15. The calculation apparently failed to exclude EP sales from the calculation of U.S. freight and warehouse expenses. *Id.* Commerce concedes that it should not have included EP sales in the calculation of NTN's U.S. freight and warehouse expenses. Defendant's Response at 87. It thus requests a remand to correct the clerical errors.

Having reviewed the comments by the parties on this issue, the court remands this action to Commerce to rectify the clerical errors with regards to its inclusion of EP sales in its calculation of NTN's freight and warehouse expenses.

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VI

CONCLUSION

For the foregoing reasons Commerce's Review in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Administrative Reviews,* 67 Fed.Reg. 55,780 (Aug. 30, 2002) is remanded in part and sustained in part. Commerce is directed to conform its determination to the instructions in this opinion.

/s/ Evan J. Wallach
Judge

Dated: August 20, 2004

New York, New York

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 3, 2007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 05-1296

NSK LTD., NSK CORPORATION, and NSK BEARINGS EUROPE, LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN-BCA CORPORATION,

Plaintiffs-Appellants,

and

ASAHI SEIKO CO., Ltd.,

Plaintiff,

and

ISUZU MOTORS LTD. and MPB CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee,

Appendix C

and

TIMKEN U.S. CORPORATION,

Defendant-Appellee.

May 3, 2007, Decided
May 3, 2007, Filed

Before BRYSON, GAJARSA, and LINN, *Circuit Judges.*

ORDER

A petition for rehearing having been filed by the Appellants,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 10, 2007.

APPENDIX D — DEPARTMENT OF COMMERCE FINAL DETERMINATION DATED AUGUST 30, 2002

55780 **Federal Register** / Vol. 67, No. 169 / Friday, August 30, 2002 / Notices

DEPARTMENT OF COMMERCE

International Trade Administration

[A-427-801, A-428-801, A-475-801, A-588-804, A-412-801]

Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Reviews.

EFFECTIVE DATE: August 30, 2002.

SUMMARY: On April 10, 2002, the Department of Commerce published the preliminary results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. The reviews cover 40 manufacturers/exporters. The period of review is May 1, 2000, through April 30, 2001.

Appendix D

Based on our analysis of the comments received, we have made changes, including corrections of certain programming and other clerical errors, in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled "Final Results of the Reviews."

FOR FURTHER INFORMATION: Please contact the appropriate case analysts for the various respondent firms as listed below; Office of AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482-4733.

France

Dmitry Vladimirov (SKF), Lyn Johnson (Bearing Discount Int./ Germany, Rodamientos Rovi/ Venezuela, Rovi-Valencia/Venezuela, Rovi-Marcay/Venezuela, RIRSA/Mexico, DCD/Northern Ireland, EuroLatin Ex. Services/United Kingdom (collectively, Resellers)), Mark Ross, or Richard Rimlinger.

Germany

Dunyako Ahmadu (Paul Mueller, FAG), Thomas Schauer (Torrington Nadellager), Lyn Johnson (Resellers), Mark Ross, or Richard Rimlinger.

Appendix D

Italy

Brian Ellman (SKF), Janis Kalnins (FAG), Lyn Johnson (Resellers), Mark Ross, or Richard Rimlinger.

Japan

Edythe Artman (Nachi), Minoo Hatten (NSK), Lyn Johnson (Koyo, Asahi), Fred Aziz (Nankai Seiko), Janis Kalnins (NPBS), Kristin Case (Isuzu), J. David Dirstine (NTN), George Callen (Osaka Pump, Takeshita), Mark Ross, or Richard Rimlinger.

United Kingdom

Thomas Schauer (RHP/NSK), Dmitry Vladimirov (Barden), Catherine Cartsos (FAG), Mark Ross, or Richard Rimlinger.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR Part 351 (2001).

Appendix D

Background

On April 10, 2002, the Department published the preliminary results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof (BBs) from France, Germany, Italy, Japan, and the United Kingdom (67 FR 17361) (*Preliminary Results*). The period of review (POR) is May 1, 2000, through April 30, 2001. We invited interested parties to comment on the preliminary results. At the request of certain parties, we held hearings for Japan-specific issues on June 6, 2002, and for Germany-specific issues on June 11, 2002. The Department has conducted these administrative reviews in accordance with section 751 of the Act.

Scope of the Orders

The products covered by these orders, ball bearings, mounted or unmounted, and parts thereof, include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, BBs with integral shafts, BBs (including radial BBs) and parts thereof, and housed or mounted BB units and parts thereof.

Imports of these products are currently classifiable under the following *Harmonized Tariff Schedule of the United States (HTSUS)* subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50,

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8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8303.30.00, 8803.90.30, and 8803.90.90.

The HTSUS item numbers are provided for convenience and customs purposes. They are not determinative of the products subject to the order. The written descriptions remain dispositive.

The size or precision grade of a bearing does not influence whether the bearing is covered by an order. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scopes of these orders. For unfinished parts, such parts are included if (1) they have been heat-treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scopes of these orders.

Appendix D

For a listing of scope determinations which pertain to the orders, see the "Scope Determinations Memorandum" (Scope Memo) from the Antifriction Bearings Team to Laurie Parkhill, dated April 1, 2002. The Scope Memo is on file in the Central Records Unit (CRU), Main Commerce Building, Room B-099.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these concurrent administrative reviews of the orders on ball bearings are addressed in the "Issues and Decision Memorandum" (Decision Memo) from Richard W. Moreland, Deputy Assistant Secretary, to Faryar Shirzad, Assistant Secretary, dated August 23, 2002, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an Appendix. This Decision Memo, which is a public document, is on file in the CRU, Main Commerce Building, Room B-099, and is accessible on the Web at *http:// ia.ita.doc.gov/frn.* The paper copy and electronic version of the Decision Memo are identical in content.

Appendix D

Sales Below Cost in the Home Market

The Department disregarded home-market sales that failed the cost-of-production test for the following firms for these final results of reviews:

Country	Company
France	SKF
United Kingdom	NSK
	Barden
Italy	SKF
Japan	Koyo
	NSK
	NTN
	Nachi
	Asahi
	NPBS
	Nankai Seiko
Germany	Paul Mueller

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made revisions that have changed the results for certain firms. We have corrected programming and clerical errors in the preliminary results, where applicable. Any alleged programming or clerical errors about which we or the parties do not agree are discussed in the relevant sections of the Decision Memo, which is accessible on the Web at *http://ia.ita.doc.gov/frn* and is on file in the CRU, Room B-099.

Appendix D

Final Results of Reviews

We determine that the following percentage weighted-average margins on BBs exist for the period May 1, 2000, through April 30, 2001:

Company	Margin (percent)
FRANCE	
SKF France S.A. and Sarma	8.51
Bearings Discount International GmbH	66.18
Rodamientos Rovi	(2)
Rovi-Valencia	(2)
Rovi-Marcay	(2)
Representaciones Industriales Rodriguez S.A.	66.18
DCD	66.18
EuroLatin Export Services, Ltd.	(2)

Company	Margin (percent)
GERMANY	
FAG Kugelfischer Georg Schaefer AG	0.34
Torrington Nadellager GmbH	1.22
Bearings Discount International GmbH	70.41
Paul Mueller Industrie GmbH & Co. KG	0.04
Rodamientos Rovi	(2)
Rovi-Valencia	(2)

Rovi-Marcay	(2)
Representaciones Industriales Rodriguez S.A.	70.41
DCD	70.41
EuroLatin Export Services, Ltd.	(2)
ITALY	
FAG Italia S.p.A.	1.42
SKF Industries S.p.A.	3.70
Bearings Discount International GmbH	68.29
Rodamientos Rovi	(2)
Rovi-Valencia	(2)
Rovi-Marcay	(2)
Representaciones Industriales Rodriguez S.A.	68.29
DCD	68.29
EuroLatin Export Services, Ltd.	(2)
JAPAN	
Koyo Seiko Co., Ltd.	7.70
NSK Ltd.	6.07
NTN Corporation	9.72
Osaka Pump Co., Ltd.	0.98
Takeshita Seiko Co., Ltd.	2.88
Asahi Seiko Co., Ltd.	2.51
Isuzu Motors Ltd.	73.55
Nachi-Fujikoshi Corporation	10.33
Nankai Seiko Co., Ltd.	0.59
Nippon Pillow BlockSales Co., Ltd.	3.42

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UNITED KINGDOM	
NSK Bearings Europe, Ltd.	16.87
FAG (U.K.) Ltd.	(1)
The Barden Corporation (U.K.) Ltd.	3.87

Resellers

With respect to EuroLatin Export Services Limited, Rodamientos Rovi C.A., Rovi-Maracay, and Rovi-Valencia and the reviews of the antidumping duty orders on BBs from France, Germany, and Italy, we have analyzed their claims that they had no shipments during the POR. We have based our analysis on letters from these respondents indicating that they had no shipments and on our examination of the Customs Service database for imports of entered merchandise involving these respondents. Based upon the record and our methodology of reviewing Customs Service information, subject to the limitations discussed below, we have determined that the respondents at issue had no shipments during the POR, and we have not established margins for use as future cash-deposit rates.

Nothwithstanding these respondents' letters reporting that they had made no shipments, in this case

1. No shipments or sales subject to this review. The deposit rate remains unchanged from the last relevant segment of the proceeding in which the firm had shipments/sales.

2. No shipments or sales subject to this review. The firm has no individual rate from any segment of this proceeding.

it is impossible to establish the accuracy of their statements with certainty from Customs Service data. The Customs information does not necessarily identify whether these resellers were involved in shipments of subject BBs during the POR. Therefore, we are not rescinding the reviews of these parties and we will instruct the Customs Service at the time of liquidation to review all documentation for suspended entries of subject merchandise. If the Customs Service finds that, in fact, any of these "no-shipment" respondents had shipments of subject merchandise during the POR, we will instruct the Customs Service to apply a facts-available rate to such respondents based on the adverse facts-available rate we have determined for BBs from the applicable country of origin (France, Germany, or Italy). See *Preliminary Results*, 67 FR at 17362, for a description of our determination of these rates.

Assessment Rates

The Department will determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. We will issue appropriate assessment instructions directly to the Customs Service within 15 days of publication of these final results of reviews. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer-specific assessment rate or value for subject merchandise.

Appendix D

a. Export Price

With respect to export-price (EP) sales, we divided the total dumping margins (calculated as the difference between normal value (NV) and the EP) for each exporter's importer/customer by the total number of units the exporter sold to that importer/customer. We will direct the Customs Service to assess the resulting per-unit dollar amount against each unit of merchandise on each of that importer's/customer's entries under the relevant order during the review period.

b. Constructed Export Price

For constructed export-price (CEP) sales (sampled and non-sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. When an affiliated party acts as an importer for EP sales we have included the applicable EP sales in the assessment-rate calculation. We will direct the Customs Service to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period (see 19 CFR 351.212(a)).

Cash-Deposit Requirements

To calculate the cash-deposit rate for each respondent (*i.e.*, each exporter and/or manufacturer included in these reviews), we divided the total dumping margins for each company by the total net value of that

company's sales of merchandise during the review period subject to each order.

To derive a single deposit rate for each respondent, we weight-averaged the EP and CEP deposit rates (using the EP and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales, we first calculated the total dumping margins for all CEP sales during the review period by multiplying the sample CEP margins by the ratio of total days in the review period to days in the sample weeks. We then calculated a total net value for all CEP sales during the review period by multiplying the sample CEP total net value by the same ratio. Finally, we divided the combined total dumping margins for both EP and CEP sales by the combined total value for both EP and CEP sales to obtain the deposit rate.

We will direct the Customs Service to collect the resulting percentage deposit rate against the entered customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. Entries of parts incorporated into finished bearings before sales to an unaffiliated customer in the United States will receive the respondent's deposit rate applicable to the order.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of ball bearings entered, or withdrawn from warehouse, for

consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash-deposit rates for the reviewed companies will be the rates shown above except that, for firms whose weighted-average margins are less than 0.5 percent and, therefore, *de minimis*, the Department will not require a deposit of estimated antidumping duties; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be the "All Others" rate for the relevant order made effective by the final results of review published on July 26, 1993 (see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al: Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 FR 39729 (July 26, 1993), and, for BBs from Italy, see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 61 FR 66472 (December 17, 1996)). These "All Others" rates are the "All Others" rates from the relevant LTFV investigation.

Appendix D

These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews.

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO are sanctionable violations.

We are issuing and publishing these determinations and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: August 23, 2002.

Faryar Shirzad,

Assistant Secretary for
Import Administration.

APPENDIX E — DEPARTMENT OF COMMERCE AMENDED FINAL DETERMINATION DATED OCTOBER 15, 2002

63608 **Federal Register**/ Vol. 67, No. 199 /
Tuesday, October 15, 2002 / Notices

DEPARTMENT OF COMMERCE

International Trade Administration

[A-588-804]

BALL BEARINGS AND PARTS THEREOF FROM JAPAN; AMENDED FINAL RESULTS OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Amended Final Results of Antidumping Duty Administrative Review.

EFFECTIVE DATE: October 15, 2002.

SUMMARY: On August 30, 2002, the Department of Commerce published in the **Federal Register** the final results of the administrative review of the antidumping duty order on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. The period of review is May 1, 2000, through April 30, 2001. Based on the correction of certain ministerial errors, we have changed the margins for ball bearings

and parts thereof for two Japanese companies, Koyo Seiko Co., Ltd., and NTN Corporation.

FOR FURTHER INFORMATION CONTACT: Please contact Lyn Johnson at (202) 482-5287 or Dave Dirstine at (202) 482-4033; AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR part 351 (2001).

Background

On August 30, 2002, the Department published in the **Federal Register** the final results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof (ball bearings) from France, Germany, Italy, Japan, and the United Kingdom (67 FR 55780) (*Final Results*).

Appendix E

We received timely allegations from Koyo Seiko Co., Ltd. (Koyo), and NTN Corporation (NTN) that we made ministerial errors in the *Final Results*. In its September 4, 2002, comments Koyo alleges that the Department did not use Koyo's updated databases in the calculation of the final margin. The petitioner, The Torrington Company (Torrington), did not comment.

We agree with Koyo that we did not use its updated databases and, therefore, we have amended the final results to correct this error. *See* the analysis memorandum from the analyst to the file dated September 17, 2002, for a detailed description of the changes we made to correct our calculations of Koyo's dumping margin.

In its September 3, 2002, comments NTN alleges that the Department made a ministerial error that resulted in the treatment of all U.S. sales of samples as zero-priced sales even though there were non-zero-priced sample sales. We agree with NTN's assertion that this is a ministerial error and have removed only zero-priced sample sales from our margin calculations for the amended final results of review. See the analysis memorandum from the analyst to the file dated September 17, 2002, for a detailed description of the changes we made to correct NTN's margin calculation. On September 9, 2002, Torrington submitted an allegation that there was a typographical error in the draft liquidation instructions we had prepared for merchandise NTN had exported during the period of review. We agree with Torrington and have corrected the error in our liquidation instructions reflecting these amended final results of review.

Appendix E

Amended Final Results of Review

As a result of the correction of ministerial errors, the following weighted-average margins exist for exports of ball bearings by Koyo and NTN for the period May 1, 2000, through April 30, 2001:

Company	Margin (percent)
Koyo Seiko Co., Ltd	7.68
NTN Corporation	9.34

The Department will determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. We will issue appropriate assessment instructions directly to the Customs Service within 15 days of publication of these amended final results of review.

We will also direct the Customs Service to collect cash deposits of estimated antidumping duties on all appropriate entries in accordance with the procedures discussed in the *Final Results* and at the rates as amended by this determination. The amended deposit requirements are effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

Appendix E

We are issuing and publishing these determinations and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: October 3, 2002.

Faryar Shirzad,

Assistant Secretary for
Import Administration.

APPENDIX F — STATEMENT OF THE UNITED STATES BEFORE WTO DISPUTE SETTLEMENT BODY THAT IT INTENDED TO IMPLEMENT THE WTO'S DECISION ON ZEROING IN THE CASE BROUGHT BY JAPAN DATED FEBRUARY 20, 2007

WORLD TRADE ORGANIZATION

Dispute Settlement Body
20 February 2007

RESTRICTED

WT/DSB/M/226
26 March 2007

(07-1261)

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 February 2007

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

[Table of Contents intentionally omitted]

* * *

2. United States – Measures relating to zeroing and sunset reviews

(a) Implementation of the recommendations of the DSB

30. The *Chairman* recalled that, in accordance with the DSU provisions, the DSB was required to keep under

surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 23 January 2007, the DSB had adopted the Appellate Body Report pertaining to the dispute: "United States – Measures Relating to Zeroing and Sunset Reviews" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

31. The representative of the *United States* said that his country recognized that anti-dumping was a complicated area and that the issue of "zeroing" was also complex. There was nothing in the WTO Agreements that mentioned or addressed "zeroing." And as the Appellate Body had made clear in the past, the best indicator of the intent of the negotiators was the text itself. However, in this dispute the Appellate Body had appeared to be trying to infer the intent of Members with respect to the issue of "zeroing" without the benefit of a textual basis. It was no surprise then that an interpretive approach, based not on agreed text but on inference, should raise a number of problems, both legal and practical.

32. The United States had provided for the convenience of Members a written explanation of its objections to the Appellate Body report.[1] For the reasons discussed at the 23 January 2007 DSB meeting and in the communication distributed at the present meeting, the United States considered that the Appellate Body's findings relating to zeroing outside the context of average-to-average comparisons in investigations were devoid of legal merit. And with regard to findings on that limited context, the United States referred Members to its past statements indicating that those findings were not beyond serious criticism.

33. Wholly apart from their legal shortcomings, the Appellate Body's findings suggested forms of implementation that simply made no sense from a policy perspective. For example, the Appellate Body had found that dumping duties might not be calculated and assessed on an import-specific basis, but must instead be calculated for all the merchandise of an exporter or producer. These findings suggested that importers of higher-priced merchandise not responsible for dumping must be penalized, either by seeing anti-dumping duties reduced for their competitors who imported the lower priced merchandise responsible for the dumping, or by themselves paying anti-dumping duties because of their competitors' conduct.

34. It was difficult to conclude that Members agreed upon such an illogical outcome. The text did not support such a conclusion, nor did the actions of the Members

1. Subsequently circulated in document WT/DS322/16.

following the completion of the text. As was well known, all the major users of the anti-dumping instrument continued to zero following the implementation of the Anti-Dumping Agreement. Even after the Appellate Body reports on zeroing in the average-to-average context, eight of nine impartial anti-dumping experts agreed that the text did not prohibit zeroing beyond that context. Were this a municipal court result, such an illogical outcome would be a prime candidate for reconsideration by the legislative branch. That was no less the case here, and the United States submitted that Members take up this issue, which affected the anti-dumping systems of a number of Members, in the Rules negotiations. Having said that, the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time.

35. The representative of *Japan* said that his country welcomed the statement of intention made by the United States that it would bring into conformity with the WTO Agreement its zeroing procedures, and was prepared to enter into consultation with the United States on the reasonable period of time, if needed, for the United States to implement the recommendations of the DSB. Japan wished to stress that, in this dispute, the Appellate Body had decided that zeroing was prohibited in all circumstances whenever calculating the "margins of dumping". The Appellate Body had reached the conclusions that the zeroing procedures were as such WTO-inconsistent: (i) in original investigations in the

context of transaction-to-transaction comparison method; (ii) in periodic reviews, and (iii) in new shipper reviews. The Appellate Body had further found that, in addition to specific periodic reviews, by relying on the margin of dumping calculated using zeroing, the sunset reviews at issue were also WTO-inconsistent. Thus, the measures to be taken by the United States for compliance must have coverage wide enough to bring all these measures into conformity, going beyond the mere abolishment of zeroing procedures in average-to-average comparison in the original investigation, as it currently planned to effectuate in the coming days.

36. The DSU provided that the adopted Appellate Body Report "shall be [ ] unconditionally accepted by the parties to the dispute" (Article 17.14). The DSU further stated that "[p]rompt compliance with [DSB recommendations] was essential in order to ensure effective resolution of disputes" (Article 21.1) and directed Members to "comply immediately with the recommendations and rulings," (Article 21.3). Japan also recalled that the DSU recognized that the "all Members will engage in [the dispute settlement] procedures in good faith in an effort to resolve the dispute" (Article 3.10).

37. The United States continued applying zeroing in a variety of anti-dumping proceedings including periodic reviews, which had practical, commercial consequences in the real world of international trade. As the Appellate Body had taken a decision, the United States was expected to take action by bringing all of the challenged

measures into compliance. Japan strongly urged the United States to take measures immediately to resolve this dispute once and for all. Japan was ready to start consultations with the United States regarding specific implementing measures both in terms of the "as applied" claims and the "as such" claims. Japan believed that the reasonable period of time for implementation should be limited to the shortest possible extent to allow the United States to take necessary measures from the viewpoint of the requirements under the DSU, as previously mentioned. Japan recalled that, as a matter of urgency, the anti-dumping duties subject to Japan's "as applied" claims in this dispute were being liquidated one by one, which practically prevented the United States' implementation of the recommendation concerning these claims. As stated above, the United States was obliged to promptly comply with the recommendations, and Japan, therefore, strongly urged the United States to take all steps available in order to prevent further liquidation and ensure the full implementation of the recommendation.

38. The representative of *India* said that his country thanked the United States for its statement and written comments on the Appellate Body report in this case. While India would examine these comments, it welcomed the US stated intention to implement the DSB's recommendations. Since his delegation had been unable to make a statement on this subject at the past DSB meeting, it wished to make a brief statement at the present meeting. India welcomed the Appellate Body Report in the matter on: "United States – Measures

Relating to Zeroing and Sunset Reviews" and noted especially that the Appellate Body had clearly held that the US "zeroing procedures" constituted a measure that could be challenged as such. The Appellate Body had also clearly held that the United States acted inconsistently with Articles 2.4, 2.4.2, 9.3, 9.5 and 11 of the Anti-Dumping Agreement by adopting/maintaining zeroing procedures in original and various review investigations. He recalled that the issue of clarifying and improving disciplines in respect of zeroing had also been a major negotiating issue in the current round of WTO negotiations on Rules. Several Members, including India, had expressed the view that there should be express provision in the Agreement prohibiting zeroing in any form, including all investigations so that such disputes could be avoided in the future. India had a systemic interest in this issue and, therefore, had been actively supporting these proposals. India had also been a third party in several disputes on this issue in recent years. India believed that the findings of the Appellate Body in the matter referred to above had settled most of the issues relating to the practice and procedures of zeroing in the fair comparison methodology in anti-dumping investigations and should now pave the way for an early conclusion of negotiations on this issue in the Negotiating Group on Rules.

39. The representative of the *European Communities* said that the issue of zeroing had been subject to numerous litigations since the first case had been brought against the EC in 1998. Since then, 12 disputes had been brought against the use of zeroing by the

United States whether as the unique subject of the dispute or as part of a wider dispute. The United States might be upset by the outcome of these disputes. But, the fact was that all issues of law had now been extensively pleaded and analysed. All points of criticism raised by the United States had already been answered and proved unfounded. There was no doubt left that zeroing ran foul of fundamental obligations of the Anti-Dumping Agreement which were to establish dumping in respect of an exporter and a certain product and to conduct a fair comparison between the export prices and normal value.

40. The representative of *Canada* said that his country welcomed the statement made by the United States that it would comply with the rulings and recommendations of the DSB. In this respect, Canada noted the substantive written and oral comments of the United States. As a matter of principle, the DSB was the proper place for Members to address dispute settlement issues that were of concern to them, including questions of legal interpretation in panel and Appellate Body reports; indeed the DSU specifically provided for this. However, to enable a fuller discussion, Members might wish to distribute their written comments well in advance of the meeting at which a subject was to be discussed. In this way, Members could have the opportunity to discuss these matters with capitals and to come to the DSB with well-considered views. This was all the more important when one was dealing with such highly technical matters. He said that he would transmit the written comments back to Ottawa, and reserved Canada's right to return

to this matter with a more comprehensive analysis and response at a future date.

41. The representative of *Mexico* said that his country had not been aware of the fact that the United States would submit written comments regarding this matter. On the basis of the discussion taking place at the present meeting, it seemed that the issue of zeroing was quite far from being resolved. Mexico was currently participating in discussions with the United States regarding this methodology. Unfortunately, the statement made by the United States at the present meeting did not encourage Mexico to believe that this would be the end of the dispute. Mexico urged the United States to take into account that enormous resources were being invested by countries in order to resolve disputes. Mexico was not the only country subject to this methodology and, given the current situation, one could well predict that more resources would have to be invested by other countries in order to have the method of zeroing declared incompatible with the DSU provisions.

42. The DSB *took note* of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

Appendix F

3 Implementation by the European Communities of the recommendations and rulings of the DSB in relation to "European Communities – Regime for the Importation, Sale and Distribution of Bananas"[2] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

43. The *Chairman* said that this item was on the agenda of the present meeting at the request of Honduras, Nicaragua and Panama, and invited the representatives of the respective countries to speak.

* * * *

2. WT/DS27.

APPENDIX G — AGREEMENT DATED MAY 8, 2007 THAT THE REASONABLE PERIOD OF TIME FOR THE UNITED STATES TO IMPLEMENT THE WTO'S DECISION IS ELEVEN MONTHS, EXPIRING ON DECEMBER 24, 2007

WORLD TRADE ORGANIZATION

WT/DS322/20

8 May 2007

(07-1900)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Agreement under Article 21.3(b) of the DSU

The following communication, dated 4 May 2007, from the delegation of the United States and the delegation of Japan to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 21.3(b) of the DSU.

The Representatives of the United States of America and Japan wish to inform you that, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the United States and Japan have mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the

Appendix G

Dispute Settlement Body (DSB) in the dispute "*United States – Measures Relating to Zeroing and Sunset Reviews*" (WT/DS322) shall be 11 months, expiring on 24 December 2007.

In addition, we wish to inform you that, in light of our agreement, Japan no longer seeks to have the reasonable period of time determined through a binding arbitration pursuant to Article 21.3(c) of the DSU. We wish to extend our appreciation and thanks to the arbitrator for his efforts in this proceeding.

We request that you circulate this notification to the Members of the DSB.

For the United States of America
Peter F. Allgeier
Ambassador

For Japan
Ichiro Fujisaki
Ambassador

APPENDIX H — PETITION FOR PANEL REHEARING OR TO STAY OR EXTEND THE TIME TO ISSUE THE MANDATE, FILED BY PLAINTIFFS-APPELLANTS NTN CORP., et al. DATED APRIL 23, 2007

05-1296

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NSK LTD., NSK CORPORATION, AND NSK BEARINGS EUROPE, LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN-BCA CORPORATION,

Plaintiffs-Appellants,

and

ASAHI SEIKO CO., LTD.,

Plaintiff,

and

ISUZU MOTORS LTD., AND MPB CORPORATION,

Plaintiffs,

v.

Appendix H

UNITED STATES,

Defendant-Appellee,

and

TIMKEN U.S. CORPORATION,

Defendant-Appellee.

Appeals from the United States Court of International Trade in Consolidated Case No. 02-00627, Judge Evan J. Wallach

PETITION FOR PANEL REHEARING OR TO STAY OR EXTEND THE TIME TO ISSUE THE MANDATE OF PLAINTIFFS-APPELLANTS, NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., AND NTN-BCA CORPORATION

ATTORNEY FOR NTN
Donald J. Unger

BAKER & MCKENZIE LLP
One Prudential Plaza, Suite 3500
130 East Randolph Drive
Chicago, IL 60601
Tel: (312) 861-8000

Dated: April 23, 2007

[Table of Contents intentionally omitted]

Appendix H

PETITION FOR PANEL REHEARING OR TO STAY OR EXTEND THE TIME TO ISSUE THE MANDATE

Plaintiffs-Appellants in this case, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., NTN Bower Corporation and NTN Corporation, (collectively "NTN"), respectfully petition for a panel rehearing, pursuant to Rule 40 of the Rules of this Court, or to extend or stay the time of issuance of the mandate, pursuant to Rules 41(b) and (d)(1) of the Rules of this Court, respectively. The reasons for this petition are set forth below.

I. Background

On March 7, 2007, this Court entered judgment in this appeal, affirming the decision of the Court of International Trade in all respects with regard to the sole issue of the calculation of freight expenses. NTN did not contest the calculation methodology known as "zeroing." Nevertheless, NTN respectfully requests that the Court grant a rehearing to address this issue given the new circumstances that have recently arisen, as will be discussed herein.

Appellants acknowledge that this Court has upheld Commerce's use of zeroing on several occasions.[1]

1. *See Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir), *cert. denied*, 125 S.Ct. 412 (2004); *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006).

However, shortly before and since the time that the Court issued its order in this case, and other related cases which did raise the zeroing issue, there have been significant developments relating to this issue and the implementation of a decision of the WTO.

On January 9, 2007, the Appellate Body of the WTO issued its report in the Government of Japan's case challenging the Department of Commerce's practice of "zeroing" in its calculations of antidumping duties.[2] The Appellate Body determined that the United States' practice of zeroing is inconsistent with several articles of the WTO Anti-Dumping Agreement.[3] Of particular relevance to this case, is the Appellate Body's determination that the United States has acted inconsistently with the Antidumping Agreement in the very administrative review that is the subject of the current appeal.

Significantly, on February 20, 2007, (15 days before the Court issued its opinion in this case) the United States represented to the WTO that it intended to implement the Appellate Body's decision regarding zeroing. *"U.S. Statement at the WTO Dispute Settlement Body Meeting,"* delivered by David P. Shark, Deputy Chief of U.S. Mission to the WTO at Geneva (Feb. 20,

2. *See* Report of the Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) ("Appellate Body Report").

3. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

2007), available at: www.usmission.ch/Press2007/0220DSB. The United States, however, also requested a "reasonable period of time" to determine its methodology for implementation. In addition, the United States has announced that it will implement the several other WTO decisions that have held the U.S. practice of zeroing to be contrary to the Anti-Dumping Agreement.[4]

Moreover, because of these developments, the Government of Japan ("GOJ") has begun consultations

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4. *See, e.g.,"Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification,"* 71 Fed. Reg. 77722 (Dec. 27, 2006) (announcing that the United States would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons as a result of the Panel Report in the *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005) *("US – Zeroing (EC)"); "Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures,"* 72 Fed. Reg. 930 (March 1, 2007) (announcing that the United States has initiated proceedings under Section 129 of the URAA to implement the WTO Panel's Report findings in *US – Zeroing (EC)* with respect to twelve different antidumping investigations; *"U.S. Statement at the WTO Dispute Settlement Body Meeting"* (Feb. 20, 2007) (announcing that the United States intended to comply with the WTO decision against zeroing with respect to another dispute, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, (WT/DS335/R) and would discontinue zeroing in the context of average-to-average comparisons in investigations).

with the Government of the United States (specifically, the Department of Commerce) about the effect of the WTO Appellate Body decision on the review at issue in this appeal, as explained in detail below. As a matter of comity toward a foreign sovereign, therefore, appellants submit that this Court should permit a rehearing, or stay or extend the time for issuance of its mandate, until the United States announces its decision as to how specifically it will implement the WTO decision. Since this matter relates to the conduct of foreign relations and since this Court has repeatedly stated such matters fall within the purview of the Executive Branch, we respectfully submit that the relief requested herein should be granted.

Appellants submit that the WTO's recent decision constitutes an event significant enough to warrant a panel rehearing because the Department now confronts a decision by the WTO that its use of the zeroing practice in calculating the appellants' antidumping liability in a specific administrative review violates the WTO Anti-Dumping Agreement, which the Executive Branch must now decide whether to implement. Indeed, the United States has stated that it will implement this decision. However, the United States has expressly stated that it requires a sufficient amount of time to consider and implement the decision. The relief requested by this motion is intended to allow such a reasonable period of time while also preserving NTN's ability to obtain the ultimate relief it believes is appropriate, that is, the liquidation of its entries without regarding zeroing.

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As noted above, NTN acknowledges that zeroing was not an issue that the company raised before the Court of International Trade or this Court, NTN did not do so because this Court had appeared to settle the issue and the Commerce Department had consistently maintained that its long-standing policy was to use zeroing in its calculation methodology.

We respectfully submit that the request being made by NTN in this motion does not constitute the raising of "new" matters since the issue of zeroing is long-standing between the Commerce Department and the respondents in antidumping cases. Indeed, the issue has arisen in most of the seventeen reviews of the antidumping duty order at issue here; in antidumping cases involving other industries; and between the United States and many other countries. There is, therefore, no question that the Commerce Department is aware of the issue or, most importantly, the significance of the elimination of zeroing for respondents in antidumping cases.

Likewise, there is no question that Commerce applied zeroing when calculating NTN's margins in this case. Zeroing was performed in this review as a matter of standard policy not just for NTN but for all respondents. Additionally, it is well-established that Commerce is very well-versed in this issue and that the agency has engaged in briefing of this issue on many occasions. Therefore, we believe that the recent events of the WTO's Appellate Body decision and Commerce's stated intent to implement that decision, are significant events that should allow NTN to raise this issue at this time.

Additionally, we note that this issue, *i.e.*, that of a WTO decision involving the issue of zeroing and the United States' stated intention to implement that decision, are currently the subject of a petition for writ of certiorari to the United States Supreme Court. *See* Petition for Writ of Certiorari (Jan. 25, 2007) filed in *Corus Staal v. United States*, 2006-1057. NTN will be filing a petition for writ of certiorari as well in connection with this Court's decision in *SNR Roulements v. U.S.*, 2005-1297,-1323 (Dec. 8, 2006).[5]

Finally, the question of zeroing is of enormous significance to respondents in antidumping cases, including NTN. We also note that, without a decision of this Court (or the Supreme Court to hear the case), NTN's sole opportunity to have Commerce implement the decision in this case will be lost by virtue of liquidation of the entries.

II. The WTO Decision

As previously stated, on January 9, 2007, the WTO Appellate Body issued its decision in Japan's challenge to the Department's practice of zeroing, in which it concluded that this practice violates the several articles of the Anti-Dumping Agreement, not only as a general matter, but also as applied by the Department in the very administrative review at issue in this appeal. This Court, however, has upheld Commerce's use of zeroing in several decisions. Therefore, the calculation methodology by which appellants' dumping liability is determined for the entries during this period of review are the subject of conflicting decisions before the U.S. courts and the WTO.

5. NTN notes that this Petition for Rehearing filed in this case was denied by the Court.

Appendix H

Following the issuance of the Appellate Body's January 9, 2007 decision, the WTO circulated the report to its members. Pursuant to the WTO's "Understanding on Rules and Procedures Governing the Settlement of Disputes" ("Dispute Settlement Understanding"), the Dispute Settlement Body adopted the decision at its meeting on January 23, 2007.[6]

Next, at a DSB meeting held on February 20, 2007, the United States informed the DSB of its intention to implement the recommendation and rulings of the DSB. Dispute Settlement Understanding, Article 21.3.

III. The Court Should Grant the Petition for Panel Rehearing

As noted above, the WTO Dispute Settlement Body adopted the Appellate Body's January 9th report on January 23, 2007, and the United States declared its intent to comply with the rulings and recommendations of the DSB on February 20, 2007. Given that litigation has all but concluded with this Court's entry of judgment, and given that the entries that are the subject of that review have not yet been liquidated and will remain unliquidated until this Court's decision is final, it is essential that the Court either order a rehearing, or stay its mandate, or extend

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6. Pursuant to the Dispute Settlement Understanding, "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to dispute unless the DSB decides by consensus not to adopt the Appellate Body report[.]" *Id.* Article 17.14. Given this mechanism for adoption, Appellate Body reports have always been adopted by the DSB.

the time for issuance thereof,[7] so that the Department can have sufficient time to decide whether and how to implement the WTO's ruling. Although the United States announced its intent on February 20, 2007 to implement the decision of the WTO, further proceedings in this court may be appropriate so that the entries that are the subject of this appeal can be treated in a manner consistent with that announced intent. For example, it may be appropriate at that point for the parties to file a motion for a remand to the Commerce Department.

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7. Although Rule 41(d)(1) provides for a stay of mandate pending a petition for rehearing, and Rule 41(d)(2) provides for a stay of mandate pending a petition for certiorari, the Courts of Appeals have recognized that these are not the only situations in which stays may be granted. *See Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (appeals court decided to stay its mandate and revise its decision after the denial of petition for certiorari because a new federal statute had been enacted in the interim); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529-30 (9th Cir. 1989) (same). And the D.C. Circuit, in administrative law cases, has withheld the issuance of its mandate to allow the agency to supplement the record or correct an error, clearly recognizing that an appeals court has the authority under Rule 41(b) to extend the time for the issuance of its mandate. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) ("[T]he court will . . . withhold the issuance of its mandate pursuant to Rule 41(b) for ninety days.") (citing *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 371 (D.C. Cir. 1989); *Nat'l Coal. Against Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884-85 (D.C. Cir. 1987); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987); *Simmons v. Interstate Commerce Comm'n*, 757 F.2d 296, 300 (D.C. Cir. 1985); *Rodway v. U.S. Dep't of Agric.*, 514 F.2d, 809, 817-18 (D.C. Cir. 1975)).

However, if a stay is not issued, Commerce will, after the preliminary injunction in this case has been terminated, instruct U.S. Customs and Border Protection to begin liquidation of the entries, and, upon liquidation, the antidumping duties due will become final. Appellants will then likely have lost the opportunity to obtain a corrected calculation of their dumping liability in a manner that is consistent with the obligations of the United States as a member of the WTO. To do nothing in this circumstance and permit the liquidation of appellants' entries to proceed would impose upon them a grossly inflated duty liability, converting the antidumping law into a punitive enactment, contrary to the repeated statements of this Court that the law is "remedial, not punitive" in nature. *See, e.g., Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005) ("the purpose of antidumping and countervailing duty laws is remedial, not punitive or retaliatory"); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990).

Furthermore, as noted above, the GOJ has commenced consultations with the Executive Branch regarding the implementation of the WTO decision, including its implementation in the very administrative review that is the subject of this appeal. The simple expedient of a rehearing and/or a brief stay (or extension of the time of issuance) of the mandate on the part of this Court will permit those consultations to proceed while preserving any rights that NTN may have as a result of these consultations and the Department's decision to implement the WTO's decision. Conversely, a refusal by this Court to do so would render such consultations, at least insofar as they apply to this administrative review, meaningless. This would

constitute an entirely unnecessary affront to the interests of a foreign sovereign, which, in the interest of comity, should be avoided. Such an undesirable result, can be avoided through simple procedural options that are readily available to this Court, and for a modest period of time – i.e., the "reasonable period of time" requested by the United States – to determine the manner of implementation.

Finally, a refusal by this Court to order a rehearing or to stay (or extend the time of issuance of) its mandate would also interfere with the ability of the Executive Branch to engage in such consultations regarding this particular administrative review – thereby interfering with its ability to exercise its authority over foreign policy matters that this Court has noted falls within the exclusive jurisdiction of the Executive Branch. *Corus Staal*, *supra*, 395 F.3d at 1349. Accordingly, if this Court allows for no method for the possible return of this case to the Department, it will prevent the Executive Branch from taking the very action that this Court has declared is exclusively within the purview of the Executive Branch – i.e., the decision of whether and how to implement an adverse WTO decision regarding the practice of zeroing.

IV. Conclusion

For the foregoing reasons, NTN respectfully requests that this Court should grant this petition and either grant a rehearing, stay the mandate, or extend the time for issuance of the mandate in this appeal until the United States has announced its decision as to how the WTO's decision will be implemented.

Appendix H

A proposed order is attached.

Respectfully submitted,

On behalf of NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-Driveshaft, Inc., and NTN Bower Corporation,

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Dated: April 23, 2007

[Addendum Intentionally Omitted]

APPENDIX I —SECOND WRITTEN SUBMISSION OF THE UNITED STATES, *UNITED STATES—SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT*, WT/DS221 DATED MARCH 8, 2002, *available at* http://www.ustr.gov/assets/Trade_Agreements/Monotoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf

UNITED STATES - SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

[Table of Contents intentionally omitted]

Appendix 1

I. Introduction

1. After a round of submissions, a meeting before the Panel, and the submission of responses to a comprehensive set of Panel questions, the issues in this dispute have become increasingly clear.

2. First, although it continues to state otherwise, Canada is in fact trying to use the dispute settlement system to establish a difference in the rights and obligations that apply to Members implementing adverse World Trade Organization recommendations and rulings in cases involving antidumping or countervailing duty measures, based entirely on whether a Member uses a prospective or a retrospective system to determine liability for antidumping and countervailing duties. It is doing so on the basis of an arbitrary and fictitious distinction regarding when a determination is allegedly "final" or "definitive" under either system. Canada's alleged distinction finds no support in the text of the AD Agreement,[1] the SCM Agreement,[2] GATT 1994,[3] or the DSU.[4] The AD and SCM Agreements recognize both systems for duty assessment, and there is nothing in the

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1. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement")

2. *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement")

3. *General Agreement on Tariffs and Trade* ("GATT 1994").

4. *Understanding on Rules and Procedures for the Settlement of Disputes* (the "DSU").

Appendix 1

Agreements indicating that the Agreements are intended to promote or create advantages or disadvantages for one approach over the other. Neither Agreement addresses the issue of implementation of adverse DSB recommendations and rulings, and Canada has abandoned any claims under the DSU.

3. Second, although Canada purports to agree that WTO remedies are prospective only, and that the only disagreement in this dispute is what constitutes a "prospective" remedy, Canada is, in fact, seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures. There is no basis in the text of the WTO Agreement for such a requirement. Antidumping and countervailing duty measures are border measures; they affect trade at the border. If an antidumping or countervailing duty measure is successfully challenged in WTO dispute settlement, a Member can implement the adverse recommendations and rulings of the Dispute Settlement Body ("DSB") in a prospective manner by revising or withdrawing the border measure. By doing so, the Member will ensure that all entries that take place on or after the implementation date - the date the measure is modified or removed - will be unaffected by the WTO-inconsistent measure.

4. Third, and most important, as Canada has continued to refine and articulate its legal arguments, it has become increasingly clear that Canada has fundamentally misinterpreted what section 129(c)(1) actually requires.

Appendix 1

The United States explains below why Canada has failed to establish a *prima facie* case that section 129(c)(1) mandates a breach of any of the WTO provisions that form the basis for its claims.

5. The purpose of this submission is not to repeat all of the arguments made to date, although the United States continues to maintain all of the views that it has expressed in previous submissions. Rather, this submission will focus on a few key issues. The United States will begin by explaining how Canada has misinterpreted section 129(c)(1) and why its arguments fail to demonstrate that section 129(c)(1) mandates a breach of any of the WTO provisions that it has raised. The United States will then address the lack of any basis for Canada's assertion that the scope of a Member's implementation obligations in antidumping or countervailing duty disputes is determined by the date on which a Member makes a "definitive" or "final" determination of duty liability, and not by date of entry. The United States will conclude by explaining why Canada's responses to the Panel's questions demonstrate conclusively that it is, in fact, seeking to establish an obligation for Members with retrospective assessment systems to provide retroactive relief, despite the absence of any support for such a requirement in the text of the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

Appendix I

II. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

6. Canada's decision to challenge section 129(c)(1) in the absence of any application of the provision to an actual fact pattern has made it difficult to understand the nature and extent of its claims and arguments. As Canada has continued to elaborate on its views, however, particularly in response to the Panel's written questions, it has become increasingly clear that Canada's entire case is based on a misinterpretation of what section 129(c)(1) actually requires. As the United States explains below, Canada's arguments fail to establish that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or GATT 1994.

A. Under Established WTO Jurisprudence, the Legislation of a Member Breaches That Member's WTO Obligations Only If the Legislation Mandates Action that Is Inconsistent with Those Obligations

7. It is well established under GATT and WTO jurisprudence that legislation of a Member breaches that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

8. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such - rather than a specific application of that legislation - was inconsistent with a Contracting Party's GATT 1947 obligations."[5] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/ discretionary distinction in considering whether a Member's legislation is WTO-consistent.

9. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the U.S. countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[6] The Panel in *Export Restraints* described the mandatory/ discretionary distinction as a "classical test" with longstanding historical support.[7]

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5. Appellate Body Report on *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88 ("*U.S. 1916 Act AB Report*").

6. Panel Report on *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4 - 8.131.

7. *Id.* at paras. 8.9.

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

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8. *See, e.g.*, Panel Report on *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

9. *U.S. 301*, para. 7.19.

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from

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10. *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.-11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.

Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the

11. Canada's Responses to Questions, paras. 48, 49.

term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) **Effects of Determinations; Notice of Implementation.—**
>
> (1) **Effects of determinations.—** Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent

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12. Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments.* "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
>
> (2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1),"

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13. Section 129(c)(I) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States — Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/D5179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would

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14. As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior

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15. Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

16. In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations. . . ." *See id.*, para. 51.

unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

III. Canada Has Established No Basis for its Efforts to Create Distinctions Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems

22. In its first written submission, the United States demonstrated that, when a Member is implementing adverse DSB recommendations and rulings, the obligation of that Member is to bring its measure into compliance on a prospective basis.[18] Canada does not

17. The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

18. United States' first written submission, paras. 29-39.

dispute this.[19] What is in dispute in this case is what it means to implement adverse DSB recommendations and rulings on a prospective basis when the measure in question is an antidumping or countervailing duty measure.

23. The United States has explained that prospective implementation of adverse DSB recommendations and rulings involving an antidumping or countervailing duty measure means that the border measure in question must be brought into compliance with the DSB recommendations and rulings and that all entries on or after the date of implementation must be treated consistently with the Member's WTO obligations.[20] In other words, prospective implementation is based on the date of entry.

24. Canada agrees that the date of entry is the relevant date for prospective implementation, provided that the Member in question has a prospective system of duty assessment.[21] In fact, Canada appears to agree that date of entry is an appropriate basis for considering prospective implementation for customs valuation issues as well.[22] Canada asserts, however, that the same

19. Canada's Oral Statement at the first Panel meeting, paras. 32-33.

20. *See, e.g.*, United States' first written submission, paras. 40-48; United States' Oral Statement at the first Panel meeting, paras. 3-8.

21. Canada's Oral Statement at the first Panel meeting, para. 38.

22. *See* Canada's Responses to Questions, paras. 38-39.

obligations undertaken by Members with prospective systems create different consequences for Members with retrospective systems[23] and that for Members with retrospective systems any determination made after the date of implementation must be consistent with the implementation, even if the determination involves pre-implementation entries.

25. Canada is the complainant in this dispute. As the complainant, Canada must make a *prima facie* case that the measure about which it complains constitutes a breach of WTO obligations. Making that *prima facie* case requires that Canada properly identify the measure about which it complains, and properly explain how that measure breaches the WTO obligations at issue. In this case, Canada has failed to identify how section 129(c)(1) breaches the United States' WTO obligations. As discussed above, Canada has failed to demonstrate that section 129(c)(1) mandates action inconsistent with Agreement obligations. As demonstrated herein, Canada also has failed to demonstrate either that retrospective and prospective systems are sufficiently distinct as to create the starkly different consequences Canada alleges or that there is a textual basis in the WTO Agreement for these distinct consequences.

26. In response to Question 2 from the Panel, Canada set forth its position that date of entry should be the basis for implementation in prospective systems. Therein, Canada claimed that after implementation:

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23. *Id.*, paras. 39-40.

> the Member [with a prospective system] is not required to apply a WTO-consistent determination to the calculation of any refunds due. Under this scenario, a Member with a prospective duty assessment system has assessed and collected the duty before the expiration of the reasonable period of time. The subsequent revocation or amendment of the order pursuant to which that duty was collected after the expiry of the reasonable period of time has no effect on the assessment and collection of that duty.[24]

While Canada might wish to create the impression that antidumping or countervailing duties collected at the time of entry under its prospective system are somehow "final" or "determinative," and are, thereby, different from retrospective systems, such an impression would be inconsistent with reality. Canada's own Memoranda describing its antidumping and countervailing duty system indicate that assessment does not occur until 30 days after entry,[25] that the duty is subject to

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24. Canada's Responses to Questions, para. 5.

25. Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 4 (Exhibit US-1); *see also, Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, footnote **** (Exhibit US-14)(wherein Canada indicated that pursuant to its prospective system, assessment of antidumping duties may occur up to 30 days after entry and that this assessment is "subject to re-determination or appeal.").

redetermination based on a request from the importer within 90 days of entry,[26] and that Canada may redetermine the normal value, export price or the amount of subsidy associated with any imported product **within two years** of the original determination.[27]

27. Canada is seeking to draw a line between reviews conducted pursuant to Article 9.3.1 of the AD Agreement (in retrospective systems) and reviews conducted pursuant to Article 9.3.2 of the AD Agreement (in prospective systems). In essence, Canada is arguing that Members with retrospective duty assessment systems have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.1 reviews of pre-implementation entries, while Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.2 reviews of pre-implementation entries.

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26. Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Re-determination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000) para. 7 (Exhibit US-15).

27. Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act* (May 16, 2000) para. 22 (Exhibit US-2); Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-I-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 5 (Exhibit US-1).

28. As the complainant in this dispute, Canada has the burden of demonstrating the legal basis for its claim. That legal basis must be rooted in the text of the WTO provisions that Canada has cited. Instead, Canada is attempting to establish a different and higher level of obligation for Members with retrospective duty assessment systems than for Members with prospective duty assessment systems, based on nothing more than an arbitrary, form over substance, description of when duties are purportedly "final" under the two systems.

29. The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. In response to question 63 from the Panel, Canada stated:

> The date of the definitive duty assessment is the date the Department of Commerce, **following judicial review**, makes its final determination consistent with the decision of the reviewing court. [...] Assuming liquidation is enjoined pending the results of judicial review, the Department of Commerce determination does not take effect unless and until affirmed by the court. In the event the court disagrees with the Department of Commerce determination under review the court will remand the issue to the Department of Commerce to make its definitive determination not inconsistent with the court's decision.[28]

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28. Canada's Responses to Questions, para. 83 (emphasis added).

Canada's statement appears to imply that for Members with retrospective systems, an administrative determination subject to judicial review is not final until the completion of that judicial review. Canada suggested as much at the first Panel meeting, when its representative appeared to claim that an administrative determination made under a retrospective system would need to comply with adverse DSB recommendations and rulings if judicial review of that determination is not completed until after the implementation date. But Canada's determinations under its prospective system are also subject to judicial review. Canada has not explained how the same terms regarding judicial review in Article 13 of the AD Agreement and Article 23 of the SCM Agreement can be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

30. Canada attempts to build its legal arguments around the concept of "finality;"[29] however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. The reality is that under either system, merchandise enters the customs territory of the

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29. *See* Canada's Responses to Questions, paras. 38-39 (seeking to introduce the concept of "finality" in response to the Panel's hypothetical facts in Question 17 and thereby basing whether a Member must treat an entry consistent with DSB recommendations and rulings on whether a domestic court, applying domestic legal principles, finds the initial action consistent with domestic law).

Member and the importer transfers a sum of money to the Member because of the antidumping or countervailing measure in place. That sum might be called a definitive duty or it might be called a cash deposit. In either case, it may or may not be the final word on the amount to be paid because of the dumping or subsidization. In either case, a review may be requested and the importer may get money back. In either case, that review may be subjected to judicial review.

31. When Canada's labels are set aside, the similarities between the two duty assessment systems are striking and in both cases, the liability for antidumping or countervailing duties arises at the border, at the time of entry. Canada argues that a Member's WTO obligations are driven not by the text of the Agreements, but by the manner in which a Member establishes its domestic law, and that a Member can change its WTO obligations by arbitrarily designating an action as "final." Canada's claims seek to elevate the words used in domestic legislation over the substance of the obligations undertaken by Members, despite the fact that Canada has previously recognized that the AD Agreement, at least, does not provide detailed rules regarding how retrospective and prospective duty assessment systems are to be applied.[30] Canada's claims are without foundation in the Agreements, would elevate form over substance, and create rights and obligations not provided

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30. *Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, Part I (Prospective and Retrospective Duty Assessment)(Exhibit US-14).

for in the Agreements. By contrast, recognizing the date of entry as the controlling date for implementation avoids creating these differences that are not contemplated in the Agreements.

IV. Canada's Answers to the Panel's Questions Confirm That Canada Is Seeking a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures

32. The United States has argued throughout this case that the DSU provides for prospective remedies in dispute settlement cases, and that there is no basis in the text of the DSU for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules.[31] Canada has claimed to support this concept.[32] Its answers to the Panel's questions, however, have conclusively demonstrated that Canada *is* in fact seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures.

33. Canada clearly establishes this point in response to question 32 from the Panel. The question asked whether Canada was arguing that the United States was obliged to refund cash deposits collected on what Canada terms "prior unliquidated entries." Canada replied that the United States would in fact be required to return such

31. *See, e.g.*, United States' first written submission, para. 2.

32. *See, e.g.*, Canada's Oral Statement at First Panel Meeting, paras. 32-33.

cash deposits.[33] Thus, Canada believes that Members with retrospective systems are not only under an obligation to ensure that all future (post-implementation) actions conform to WTO rules; they are also under an obligation to undo *past* (pre-implementation) actions.

34. The United States appreciates Canada's candor, since it crystallizes for the Panel what this case is actually about. The United States fails, however, to see the legal basis for Canada's assertion. Canada has argued repeatedly during this dispute that its arguments do not amount to a claim for retroactive relief because it is only asking the United States to make its decisions *after* the implementation date in accordance with adverse DSB recommendations and rulings, even if those decisions relate to pre-implementation entries. And it has sought to distinguish the obligations applying to Members with prospective systems by claiming that those Members assess and collect duties at the time of entry, so that there are no decisions "after" the reasonable period of time that need to be made. In Canada's view, a Member would only violate WTO rules if were to make a WTO-inconsistent decision *after* the reasonable period of time.

35. When a Member with a retrospective system collects cash deposits, however, it does so pursuant to a determination made *prior to the date of entry* that the conditions for requiring such deposits were met. In this sense, the situation of the Member with a retrospective system is identical to the situation of the Member with a prospective system.

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33. *See* Canada's Responses to Questions, para. 67.

36. In addition, under the logic that Canada has applied to prospective systems, if a Member with a retrospective system took *no* action with respect to cash deposits after the implementation date, there would be no possibility of a WTO breach. Canada has failed even to attempt to explain how its asserted obligation not to take WTO-inconsistent action after the implementation date can somehow be transformed into an affirmative obligation to *take* a certain action — namely, refunding cash deposits collected before the implementation date — when that "obligation" appears nowhere in the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

37. Finally, the United States notes one additional point on the subject of retroactive remedies. The United States has argued repeatedly that the scope of a Member's implementation obligations is governed by the situation in effect at the time of entry. As the United States noted at the first Panel meeting, however, if Canada is correct in arguing that the critical issue is the legal situation in effect when a Member determines final duty liability, then a Member that has received DSB authorization to suspend concessions may do so with respect to unliquidated, pre-authorization entries. Canada's attempt to distinguish the *Customs Bonding* case on the basis of when the "rate of duty is fixed" misses the point,[34] since its argument implies that a Member that "fixes" the rate of duty at some point after the date of entry could, in fact, suspend concessions on unliquidated, pre-authorization entries.

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34. *See* Canada's Responses to Panel Questions, para. 80.

V. Conclusion

38. For the foregoing reasons, and for the reasons set out in previous submissions, the United States respectfully requests the Panel to find that Canada has failed to establish that section 129(c)(1) breaches any of the provisions that Canada cited in its request for a panel. Canada's arguments to the contrary are without a legal basis and the Panel should reject them.